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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL J. MORRISSEY,

Petitioner,

v.

WILLIAM MORROW AND COMPANY
AND
BANTAM BOOKS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Lower Court's failure to give notice that Respondents' FRCP Rule 12(B6) motion would be treated as a motion for summary judgment denied Petitioner the right to conduct full Discovery as provided for under the Federal Rules, and thereby present all the facts pertinent to the issues before the Court.

B. Whether the Lower Court erroneously granted summary judgement in favor of the Respondents where genuine issues of material facts existed in the record before the Court, and specifically where

(1) Factual issues existed regarding the commencement of Petitioner's causes of action; and

(2) Factual issues existed regarding the law of the jurisdiction to apply in ruling on Petitioner's causes of action.

C. Whether it is proper for matters of record in a previously non-suited case to be considered by the court in its rulings made in a subsequently filed case where:

(1) the subsequent case, while alleging essentially the same causes of action, is docketed as a new case (with a new court docket number); and

(2) matters the court considered from the earlier non-suited case were never made a part of the record in the subsequent case.

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No.

In the Supreme Court

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October Term, 1984

MICHAEL J. MORRISSEY,
Petitioner,

vs.

WILLIAM MORROW & COMPANY, INC.
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BANTAM BOOKS, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO
UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

To The Honorable Chief Justice of the United States and to The Associate Justices of the United States Supreme Court:

Petitioner Michael J. Morrissey files this Petition for Writ of Certiorari to review the judgment of the United States

Court of Appeals for the Fourth Circuit, which affirmed, in a 2 to 1 decision, the judgment of the Trial Court which granted Respondents' motion to dismiss Petitioner's case based upon a Statute of Limitations defense. In so doing, the court denied Petitioner time requested to conduct discovery as provided for under the Federal Rules of Civil Procedure.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

A copy of the opinion of the U.S. Court of Appeals for the Fourth Circuit, upon which this Petition is based, is attached as Appendix A. A copy of the Trial Court's Order appealed to the

Fourth Circuit is attached as Appendix B.

Other documents attached containing material relevant to this Petition are:

(1) a copy of the affidavits submitted by Respondents in the District Court, attached as Appendix C. The affidavit of Helen Florence Grant was the basis upon which the court granted Respondents' Motion to Dismiss. A copy of Respondents' Motion to Dismiss is also included in Appendix C.

(2) A copy of Petitioner's brief statement that was submitted as an informal brief pursuant to an Order of the U.S. Court of Appeals for the Fourth Circuit, along with the Court's order

setting a full briefing schedule and oral argument, is attached as Appendix D.

(3) A copy of Petitioner's Petition for Rehearing as filed with the Court of Appeals is attached as Appendix E.[1]

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Memorandum Opinion and Order of the Court of Appeals is dated as having been argued on December 8, 1983 and decided on July 26, 1984. Petitioner

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[1]Issues raised in the Petition for Rehearing are included in those brought before this Court on this Petition for writ of certiorari. Rather than restate these considerations, and the points of authorities in support thereof, the Petition for Rehearing is attached for the Court's reference in support of why this Petition should be granted.

filed a Petition for Rehearing and Suggestion for Rehearing en Banc on August 15, 1984. On September 25, 1984, the Petition for Rehearing was denied and the Suggestion for Rehearing en Banc was rejected.

Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. ¶1254(1).

RULES AND STATUTES INVOLVED

The Federal Rules of Civil Procedure, and specifically FRCP Rule 12(b) and Rule 56.

Fourteenth Amendment to the U.S. Constitution.

REASONS FOR ALLOWANCE OF THE WRIT

The section entitled Questions Presented For Review, ante, sets forth important questions regarding the interpretation and application of the Federal Rules of Civil Procedure, and specifically the important rules governing discovery and the appropriateness of Motion to Dismiss and Summary Judgment rulings entered at the initial stages of an action alleging liable, defamation, and wrongful invasion of privacy. The important questions raised in this context also include the proper standards for differentiating between rulings on a Motion to Dismiss, as opposed to a Motion for Summary Judgment, and the right to pursue discovery as provided for under the Rules in each situation.

This area of the law has received considerable Court attention in recent years, and actions brought in this field appear to be on the increase. At the same time, the administrative concerns of the Court to keep their dockets "current" have brought into focus more often, as in the present case, questions based upon due process and fairness standards as they relate to early attempts to reject causes of action without ever reaching the full discovery stage provided for under the Federal Rules of Civil Procedure. The ambiguity of key standards, particularly in the field of libel and related tort actions have created conflicts among the Circuits which, unless otherwise corrected, give rise to active forum-shopping by parties to avoid undue

harshness which may exist in a neighboring jurisdiction.

The issue in this field of law that frequently surfaces in this context is that of the time of commencement of a libel action, or a cause brought under a related defamation claim. In the present case, Petitioner has shown that, regardless of the standard applied, this case should not have been so summarily dismissed because the scant single affidavit relied upon as the sole basis for dismissal is clearly deficient to support such a ruling. However, the case brings to the forefront the importance for this Court to correct both the specific errors in this case, and a needed opportunity to clarify the controlling standards and guidelines under the Federal Rules in ruling on an early Motion to Dismiss.

The Court should exercise its judicial discretion to grant this Petition for writ of certiorari for the instant case presents a situation where the Trial Court has so far departed from the accepted and usual course of judicial proceedings, and the Lower Court has so far sanctioned such a departure, that an exercise of this Court's power of supervision is needed to avoid a dangerous precedent.

The ruling in this case is based upon a gross and severe misstatement of material facts. It is these misstatements which the Court, in large part, relied upon to deny Petitioner the relief requested, namely, to engage in basic discovery so as to present the relevant and material facts, uniquely in Respondents' control, to the Court so

that a ruling can be made on a complete record.

Only this Court can correct the personal attack which exists in the Court of Appeals' published decision. This is attributable in large measure to the Opinion's lifting of argument from Respondents' brief which carried with it incorrect material facts, and as a result, improper legal rulings which represent a sharp deviation from the standards governing the applicable Federal Rules.

STATEMENT OF THE CASE

A. Preliminary Statement

The Lower Court was in error to grant Summary Judgement in favor of Respondents and against Petitioner. The

Court relied solely on one abbreviated affidavit in making its ruling. There are two major flaws in the use of such an affidavit in this manner that dictate reversal of the summary judgment below.

First, summary judgment was in error because there was no motion for summary judgment pending and because the court did not notify the parties that it intended to treat Respondents' Rule 12(b)(6) motion as a motion for summary judgment. Second, summary judgment was in error because the only evidence before the trial court -- two affidavits, one from each Respondent -- failed to address either the proper test for ascertaining the accrual of Petitioner's causes of action or the numerous factual determinations necessary for a proper application of that test.

Because the Lower Court affirmed the Trial Court's treatment of Respondents' Rule 12(b)(6) motion as one for summary judgment, Petitioner was entitled to receive, but the court refused to grant, a reasonable time for discovery so that Petitioner could exercise his right to present to the court all material bearing on the facual issues that this lawsuit presents. Moreover, on its face, the sparse record on which the trial court chose to base its ruling presented genuine issues regarding material facts important to the proper resolution of this lawsuit. This action thus should be reviewed and corrected by this Court for it represents a radical departure from usual application of particular Federal Rules which are relied upon in most every Federal Court case.

B. Proceedings Below

On December 1, 1980, Petitioner filed a Complaint in the United States District Court for the Eastern District of Virginia against William Morrow & Company, Inc. and Bantam Books, Inc. (hereinafter referred to as "William Morrow" and "Bantam", or jointly as "Respondents"). The Complaint asserted defamation, invasion of privacy, and injurious falsehood causes of action based on statements contained in a book -- Spooks: The Haunting of America - The Private Use of Secret Agents -- (Spooks) published by defendants. Almost six months after the filing of the Complaint, on May 21, 1981, William Morrow and Bantam filed a motion for summary judgment. At the hearing, held

on June 5, 1981, the court granted a short continuance to allow the parties to undertake discovery regarding the factual issues raised by the motion for summary judgement. Four days later after discussions between the parties and because of the short period of time allowed by the trial court for the completion of all discovery along with related scheduling conflicts, plaintiff sought and the defendants agreed to a Stipulation of Dismissal without prejudice (case non-suited).

On November 19, 1981, the action currently before this Court was filed. William Morrow and Bantam sought Petitioner's Consent to two continuances. Respondents did receive from the Court two extensions of time to respond, after which they filed on

January 7, 1982 a Motion to Dismiss accompanied by a supporting memorandum. Respondents based their Motion to Dismiss on Rule 12(b)(6) and argued that the court should dismiss the Complaint for failure to state a claim upon which relief could be granted because of the running of the applicable statute of limitations.

The hearing on the defendants' Motion to Dismiss was originally set by the court for January 22, 1982, but was moved to February 12 because of a scheduling conflict. At the hearing and without prior notification to Petitioner, the trial court treated the defendants' stated Rule 12(b)(6) motion as a Rule 56 summary judgement motion. It then denied Petitioner's request for a reasonable time in which to pursue

discovery so as to be able to present all materials pertinent to a Rule 56 motion, and entered summary judgement against Petitioner.

Petitioner appealed to the U.S. Court of Appeals for the Fourth circuit. Following submission of informal briefs, the Court issued an order finding that oral argument would be helpful to the court in deciding the case. Oral argument was held on December 8, 1983 and on July 26, 1984 the Court issued its 2 to 1 decision which affirmed the Trial Court's action.

C. Argument

(1) The Court's Failure to Give Notice That the Rule 12(b)(6) Motion Would Be Treated As a Motion For Summary Judgment Denied Petitioner His Right to Discover and Present All Materials Pertinent to the Factual Issues Before the Court

The law in the Fourth Circuit, consistent with the mandate of the Federal Rules of Civil Procedure, requires that a trial court notify the parties if it intends to consider matters outside the pleadings and treat a Rule 12(b)(6) motion as one for summary judgment. Fed. R. Civ. P. 12(b); Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979); Johnson v. RAC

Corp., 491 F.2d 510, 514 (4th Cir. 1974). Because a Rule 12(b)(6) motion is directed at the sufficiency of the pleadings only, while a Rule 56 motion tests the actual factual controversies raised by those pleadings, this notification is necessary to allow the non-moving party the opportunity to exercise his right to present "all" materials pertinent to the factual issues that a Rule 56 motion raises. Fed. R. Civ. P. 12(b); Johnson, 491 F.2d at 514. The right to present "all" such materials is meaningless unless the court also grants a reasonable time for discovery so that the parties have equal access to all pertinent materials.

The right to a reasonable time for discovery is particularly compelling in a case such as this where the facts

necessary to resolve the disputed summary judgment motion are peculiarly within the Knowledge of the defendants. Johnson, 491 F.2d 514; see also Alabama Farm Bureau Mutual Casualty Co. v. American Fidelity Life Insurance Co., 606 F.2d 602, 609 (5th Cir. 1979). cert. denied, 449 U.S. 820 (1980) (summary judgment should not ordinarily be granted before discovery has been completed when plaintiff's proof must come mainly from sources within control of defendants). The trial court committed error in failing to notify Petitioner that it intended to treat the Respondents' motion as one for summary judgment and in failing to provide Petitioner a reasonable time for discovery. [Respondents' "Motion To Dismiss" is included with the affidavits

filed by Respondents in Appendix C (only the affidavit of Florence Grant was used by the Court as the basis for its ruling).

William Morrow and Bantam had filed a different motion for summary judgment in the earlier non-suited case. The trial court erroneously considered the two motions to be identical. Yet, even a cursory examination reveals that the two pleadings are totally different, raising completely separate issues, and the motion in this case is clearly one to dismiss under FRCP 12(b).

If Respondents had meant their pleading to be a motion for summary judgment they would, or should, have denominated it as such as they did in the earlier lawsuit. Further, the memorandum in support of the Motion to

Dismiss specifically cites Rule 12(b) as authority for the motion, with no mention of Rule 56, and tracks the language of Rule 12(b)(6) in stating that the Complaint should be dismissed because it fails to state a claim upon which relief may be granted. Language tracking the pertinent provision of Rule 56--there are no issues of material fact--is conspicuously absent from the Motion to Dismiss.

The trial court erred in failing to perceive the difference between the Motion to Dismiss and the earlier-filed motion for summary judgment, and in failing to notify Petitioner that

Respondents' Rule 12(b)(6) motion would receive Rule 56 treatment.[2]

Respondents argued on appeal that the trial court's error in not notifying Petitioner that it intended to treat the Rule 12(b)(6) motion as a summary judgment motion was excusable because Petitioner was less than diligent in pursuing discovery. The comments of the trial court from the bench indicate that it relied on this argument in granting summary judgment. The Lower Court's opinion (Appendix A) contains unusually

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[2]The trial court never questioned Petitioner at the February 12 hearing regarding whether he considered the Motion to Dismiss to be a Rule 12 motion or a Rule 56 motion. The failure to even question Petitioner on this subject stems from the fact that the trial court did not perceive the difference between the motion filed in this lawsuit and the motion filed in the earlier non-suited lawsuit. It erroneously treated the motions as if they were identical.

harsh language directed to Petitioner on this point which is wholly unjustified. A careful examination of the course of this litigation demonstrates that Petitioner pursued a reasonable course of trial strategy and was penalized for his lack of clairvoyance in predicting what responsive pleading the Respondents intended to file.

Petitioner did file discovery in the earlier lawsuit. That discovery included a request for production of documents, sets of interrogatories to both Respondents, and deposition notices. No response to that discovery was received, however, as Respondents objected to the discovery filed. The lawsuit was dismissed by stipulation prior to the resolution of these discovery disputes.

In the interim between the dismissal of the first lawsuit and the filing of the second, Petitioner could not, of course, have filed discovery. When he filed the second lawsuit, Petitioner was not required, nor would it have been sound trial strategy, to try to forecast the substance of Respondents' responsive pleading and file discovery to challenge some imaginary motion. The extensions of time that Respondents sought in which to file their responsive pleading were further support for Petitioner's decision not to try to guess Respondents' trial strategy.

When Respondents did finally file their responsive pleading, Petitioner was confronted not with a summary judgment motion focusing on the factual issues in controversy, but instead with

a Rule 12(b)(6) motion focusing on the pleadings only. Absent notification from the trial court that it intended to convert the motion actually filed into one for summary judgment, Petitioner was under no compulsion to pursue discovery regarding factual materials irrelevant to the motion then pending before the court. Instead, Petitioner properly concentrated his efforts on preparing and filing a response to the Rule 12(b)(6) motion which is tested based on the record established as of that time chosen by Respondents to file such a motion.

In Davis v. Howard, 561 F.2d 565 (5th cir. 1977), the Fifth Circuit reversed a trial court's decision to dismiss because the trial court converted the defendants' Rule 12(b)(6) motion to a

summary judgment motion without giving notice of the conversion. In so ruling, the Fifth Circuit made the following pertinent observations:

> [T]he record must adequately demonstrate that all counsel were aware of the intentions of the district judge to treat the motion as converted, together with a reasonable opportunity afforded to the non-moving party to present, by way of affidavit or otherwise, anything necessary to rebut the contention of the moving party.
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> ***
>
> "They [the litigants] cannot read over the judge's shoulder, or penetrate his memory. Nor can we. From Shakespeare's

Hamlet to Albee's Tiny Alice, soliloquies and asides have been shared with the audience."

Where there is a motion to dismiss for failure to state a claim upon which relief may be granted, there can never be a wide overview by the trial court, beyond the pleadings to include matters outside, without affording all litigants the opportunity to offer their perspectives on the additional matter by way of admissible evidence.

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The concepts of notice, admissibility, and opportunity to be heard are ancient primaries. Independent from

> these notions in advocacy, there is the trial court's duty to insure that its basis for judgment is without error. This duty of the trial court distinguishes the margin of allowances we have held in the instance of an original Rule 56 motion from summary disposition following a Rule 12(b)(6) motion.... However correct the conclusion below may be in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice.

561 F.2d at 571-72 (quoting Soley v. Star & Herald Co., 390 F.2d 364, 369-70 (5th Cir. 1968)).

Petitioner did not receive the requisite notice and opportunity to be heard, and therefore was denied the due process to which he was entitled and had relied upon. In failing to provide Petitioner with that notice and opportunity, the trial court failed to discharge its duty to insure that the basis for its judgment was without error. Accordingly, this action cries out for review and to be met with supervisory control. To let it lie as is would condone a form of trial by surprise, a sporting theory of justice that has been consistently rejected in federal procedure.

(2) The Lower Court Was In Error to Affirm the Summary Judgment Against Petitioner Because the Record Before the Court Presented Genuine Issues of Material Fact Yet to Be Decided.

Summary judgment is a powerful procedural tool. When granted, a litigant loses his day in court without having the opportunity to present all of his case to a trier of fact in the manner he desires. See Brunswick Corp. v. Vineberg, 370 F.2d 605, 612 (5th cir. 1967) Summary judgment is a "lethal weapon;" courts must be conscious of its aims and targets and beware of overkill in its use). Because of its potency, a number of safeguards exist to insure that a court does not improvidently grant a summary judgment motion.

Summary judgment is not appropriate unless there is no genuine issue of material fact for the trier of fact to resolve. Associated Press v. United States, 326 U.S. 1 (1945); Kirby v. Blackledge, 530 F.2d 583 (4th Cir. 1976). The moving party bears the burden of demonstrating the absence of any dispute regarding any material factual issue. George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 555 (2d cir. 1977). The non-moving party is entitled to all favorable inferences that reasonably may be drawn from the evidence before the court, and all ambiguities must be resolved aginst the moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety

Co., 381 F.2d 245 (4th Cir. 1967). If the affidavits introduced in support of a motion for summary judgment do not, standing alone, establish the absence of a genuine issue of fact, the motion should be denied even if no opposing affidavits or evidentiary matters are presented.[3] Adickes v. S.H.

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[3] In discussing the principles of law controlling the propriety of summary judgment, the Fifth Circuit stated in Alabama Farm Bureau Mutual Casualty Co. v. American Fidelity Life Insurance Co., 606 F.2d 602 (5th Cir. 1979):

> The burden is on the party seeking summary judgment to show that there is no genuine issue of material fact . . .
>
> ***
>
> Summary judgment may be improper, even though the basic facts are undisputed, if the ultimate facts in question are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts.

606 F.2d at 609.

Kress & Co., 398 U.S. 144 (1970); Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979). Before granting summary judgment, a court must be able to find that "it is clear that upon no conceivable state of facts as shown by the proof could [the non-moving party] recover." Murray v. City of Chicago, 634 F.2d 365, 366 (7th Cir. 1981).

In granting summary judgment in this case due to the running of the statute of limitations, the trial court looked to only two affidavits which were attached as exhibits to the Rule 12(b)(6) Motion to Dismiss.[4]

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[4]The Court's decision actually relies only on one of the two affidavits submitted, that being one of a Florence Grant, associated with Respondent Bantam Books, Inc. It was held that the republishing of the book by Bantam renewed the cause of action against William Morrow. Hence, the Court found the William Morrow affidavit unnecessary to its decision.

Those cryptically-worded affidavits do no more than allege the single fact that the book that is the subject of this lawsuit was "generally available" and "sold to the public" prior to November 20, 1979. These two affidavits constituted the entire factual record on which the trial court based its summary judgment ruling. As demonstrated below, genuine issues of material fact existed at the time of the trial court's ruling regarding both factual matters that the affidavits addressed and ignored.

a) Genuine Issues Of Material Fact Existed Regarding The Accrual Of Petitioner's Causes Of Action

In granting summary judgment against Petitioner because of the running of the statute of limitations, the Trial Court did not give any indication as to the test it was applying for determining the accrual of the causes of action. Courts differ as to the appropriate test for determining the accrual of the causes of action in mass-media, multi-state publication cases. See, e.g., Fleury v. Harper & Row, Publishers, Inc., 698 F.2d 1022, 1027 (9th Cir. 1983), cert. denied, 52 U.S.L.W. 3264 (U.S. Oct. 4, 1983) (No. 83-13) (cause of action accrues on first general distribution of publication to public); Wildmon v.

Hustler Magazine, Inc., 508b F. Supp. 87, 91 (N.D. Miss. 1980) (cause of action accrues when periodical is substantially distributed to public); Gregoire v. G.P. Putnam's Sons, 298 N.Y. 119, 81 N.E.2d 45, 49 (1948) (cause of action accrues when finished product is released by publisher for sale in accord with trade practices); Dominiak v. National Enquirer, 439 Pa. 222, 266 A.2d 626 629 1970) (plaintiff may select any delivery or sale of a book as the offending publication and collect damages for injuries to reputation suffered for one year thereafter). See generally Annot., 42 A.L.R.3d 807 (1972). None of these tests, however, use the words "generally available" that are found in the affidavits considered by the trial court. In any event,

whichever test is applied, including the "generally available" test apparently applied below, a number of factual issues must be decided before a court can determine whether the test is satisfied.

The Trial Court had no evidence before it on which to base a decision on those factual issues. For example, the record is void of any evidence regarding the trade practices of the publishing industry. Without such evidence, the trial court could not possibly have made a factual determination regarding whether the defendants in this action published and released Spooks in accordance with those practices. The record also does not contain any information regarding how many hardcover and paperback books were printed, how

many were distributed for sale, where those books were distributed, how many books (if indeed any) were sold by November 20 1979, and how many books have been sold altogether. Without this information, a trier of fact cannot possibly find that the work was "generally distributed," or "substantially distributed," or "generally available" by a certain date.

Moreover, there is no information whatsoever in the record regarding whether any of the books were ever distributed in Northern Virginia or the District of Columbia or, if so, by what date. See Wildmon v. Hustler Magazine Inc., 508 F. Supp. 87, 90 n.5 (N.D. Miss. . 1980) (trend is that statute of limitations begins to run when allegedly defamatory material is published in

geographical region in which plaintiff resides). At the very least, given the factual record in this case, the trial court could not properly find that there was no genuine dispute regarding these material factual issues.

In addition to the deficiencies discussed above, the affidavits considered by the trial court do not contain any information regarding reprints, republications, or subsequent editions of Spooks. William Morrow and Bantam argue that, under the single publication rule, the absence of this information in the factual record is not important because such activity by the defendants would not affect the accrual of the causes of action. The argument is without merit because Virginia has not adopted the single publication rule.

In Weaver v. Beneficial Finance Co., 199 Va. 196, 198 S.E.2d 687 (1957), the Virginia Supreme Court stated:

> It is well settled that the author or originator of a defamation is liable for a republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication. This is based upon the principle that such republication constitutes a new cause of action against the original author. However, the original author is not responsible if the

> republication or repetition is not the natural and probable consequence of his act, but is the independent and unauthorized act of a third party.

199 Va. at 199.

Whether this statement of the law is labeled as the single publication or multiple publication rule, it is the law in Virginia. The trial court did not even consider whether there was any republication of Spooks and, if so, whether that republication was natural and probable. In short, the Trial Court did not have sufficient evidence before it to make the factual determinations that are required before applying the applicable law.

Reissues or republications of Spooks are relevant to the accrual of the causes of action. A reissue or a republication, whether under the single or multiple publication rule, creates a new cause of action with a new statute of limitations. Rinaldi v. Viking Penguin, Inc., 73 A.D.2d 43, 425 N.Y.S.2d 101 (1st Dep't 1980), aff'd, 52 N.Y.2d 422, 438 N.Y.S.2d 496, 420 N.E.2d 377 (1981) (if book is later reissued or republished, statute of limitations with respect to that reissue or republication commences to run anew). The failure of the trial court to even consider whether a factual issue existed regarding a republication of Spooks is also evidence that the trial court did not fully consider whether genuine issues of material fact existed at the time of the summary judgment ruling.

In sum, given the numerous material factual issues that remain unresolved, the Trial Court's ruling granting, and Appeals Court's affirmance, of summary judgment against Petitioner was erroneous. If the court had carefully considered the factual issues, it could not have concluded that it was "clear that upon no conceivable state of facts as shown by the proof" could Petitioner have recovered. Murray v. City of Chicago, 634 F.2d 365, 366 (7th Cir. 1981).

b) Genuine Issues Of Material Fact Existed Regarding The Law Governing Appellant's Causes of Action

The Trial Court failed to even consider the choice of law issues presented by this lawsuit. The record shows that Petitioner has substantial personal contacts with both the Commonwealth of Virginia and the District of Columbia, but the Trial Court apparently assumed that the law of Virginia was controlling. The decision summarily dismisses in essence any consideration on this issue by concluding from the Complaint, inter alia, that Petitioner resides in Virginia. Left unanswered are similar questions concerning Petitioner as of the time when the publications were

being prepared, promoted, distributed and sold. Information such as this is essential in deciding conflict of laws questions as presented.

The Trial Court was bound to apply Virginia conflicts law. That law requires a factual examination and finding of the "place of the wrong" to determine the controlling law. McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979). Despite the fact that the Trial Court ignored this factual issue altogether, William Morrow and Bantam argue that the application of Virginia law was proper.

The fallacy with Respondents' argument, and the reason the Lower Courts were in error in not even considering the choice of law issue in granting summary judgment, is that the

"place of the wrong" is necessarily a factual determination dependent upon the unique circumstances of each case. Defamation and invasion of privacy are related causes of action but seek redress for separate injuries. Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 824 (D.D.C. 1955). The law, including the limitation period, applicable to each cause of action is dependent on an analysis of the injury that each cause of action redresses and the factual determination of where the wrong occurs. The Courts below failed to make that analysis. In fact, the Trial Court did not have before it, or permit Petitioner the opportunity to supply, the evidence necessary for that analysis.

CONCLUSION

For all of the reasons stated above, this Petition for writ of certiorari should be granted.

Respectfully submitted,

Michael J. Morrissey

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for writ of certiorari was mailed by first-class mail, postage prepaid, on December 24, 1984 to Brian Harvey, Esq., Baker and Hostetler, counsel for Respondents, 818 Connecticut Avenue, N.W., Washington, D.C.

Michael J. Monissey

APPENDIX

APPENDIX A

(PUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 82-1213

Michael J. Morrissey, Appellant,

vs.

William Morrow & Co., Inc.,
Bantam Books, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (81-1106-A)

Argued: December 8, 1983

Decided: July 26, 1984

Before HALL, MURNAGHAN, and CHAPMAN, Circuit Judges

W. Jeffrey Edwards (D. Alan Rudlin, Hunton & Williams Michael J. Morrissey on brief) for Appellant; Bruce W. Sanford (Brian S. Harvey, Baker & Hostetler on brief) for Appellees.

CHAPMAN, Circuit Judge:

Michael J. Morrissey, a practicing attorney, brought this action against William Morrow & Company, Inc. and Bantam Books, Inc., publishers of the book Spooks: The Haunting of America -- The Private Use of Secret Agents alleging claims of defamation, invasion of privacy and injurious falsehood. Federal jurisdiction is alleged under 28 U.S.C. § 1332(a) - diversity jurisdiction. The district court granted defendants' motion for summary judgement finding the action barred by the one year statute of limitations, Va. Code 8.01-248. Plaintiff appeals alleging error of the district judge in (1) refusing to allow additional time for discovery after defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b) had been converted to a motion for summary judgement under Federal Rule of Civil

Procedure 56; (2) "ruling on the record then established" that the statute of limitation began to run when the book was generally available to the public; and (3) failing to consider the possible conflict of law problem presented by the plaintiff's claim of invasion of privacy.

Finding no merit in these exceptions, we affirm.

I

The complaint alleges that Morrissey is an attorney and electrical engineer and that William Morrow published the hardback edition of Spooks and Bantam Books published the paperback edition of the same book. The complaint further alleges that publishing of the "false allegations, malicious statements and innuendo and implications assigning this material in the books has been humiliating and embarrassing to the plaintiff, caused him mental distress and has harmed

him in his personal and business relationships and has the potential of causing further harm to him particularly in his profession as a lawyer." Plaintiff also alleges that he is an attorney admitted to the Bars of Virginia, the District of Columbia and various federal courts including the United States District Court for the Eastern District of Virginia.

His first action against the present defendants was filed in the United States District Court for the Eastern District of Virginia on December 1, 1980 with the plaintiff appearing pro se. On May 21, 1981 defendants filed a motion for summary judgement upon the ground that the Virginia one year statute of limitations applied to the action and that William Morrow's publication of Spooks occurred in August of 1978 and Bantam Books publication occurred not later than

November 20, 1979 and the one year statute of limitations had run before the complaint was filed on December 1, 1980. This motion was accompanied by an affidavit of James D. Landis, vice president and editorial director of William Morrow and an affidavit of Heather Grant Florence, the vice president, secretary and general counsel of Bantam Books. Each affidavit set forth the date that the book was available for sale to the public. The plaintiff filed nothing in response to the motion for summary judgement. The motion was set for hearing on May 29, 1981, but on May 28, 1981, an attorney entered an appearance for Morrissey and obtained a continuance of the hearing on the summary judgement motion until June 5, 1981. A pretrial order had been entered by the district judge on April 1, 1981, establishing a discovery cut off date of

June 12, 1981.

At the June 5, 1981 hearing plaintiff's attorney argued that additional discovery was needed as to the statute of limitations issue and the district court granted this motion and again continued the hearing for summary judgement. Depositions were scheduled with plaintiff's scheduled for June 9, 1981. On that date plaintiff voluntarily dismissed the action without having conducted any discovery.

On November 19, 1981 plaintiff filed the present action. again proceeding pro se, against the same defendants and alleging the same causes of action. On January 7, 1982 defendants filed a motion to dismiss the new action on the ground that it was barred by the statute of limitations. In support of this motion defendants filed affidavits seeking to establish the dates of publication and

submitted the same supporting memorandum of law as used in the May 1981 motion. The hearing on this motion was set for January 22, 1982, but at Morrissey's request the hearing was continued until February 12, 1982. Morrissey did not notice or obtain any discovery in connection with the second action, although he was aware of the grounds for the defendant's motion and the supporting affidavits. In his opposition to the motion he pointed out that since it was supported by affidavits it must be tested by the standards of Rule 56. At the hearing on February 12, 1982 the plaintiff arrived late and argued against the motion and asked for additional time for discovery. He admitted that he had filed no interrogatories in either the first action or the second action, but stated that he had telephoned one of the defendants asking for date of publication

information and seemed surprised that this telephone request was denied. He asserted that he had written a letter to the defendants' attorneys in June 1981 asking certain questions, but admitted that these were not in the form of interrogatories under the Federal Rules.

The district court found that the plaintiff had over six months to conduct discovery in the first action and three months to conduct discovery in the second action, but he had done nothing to create a factual dispute and had submitted nothing in opposition to the defendants' affidavits, although he had known since May 21, 1981 the defendants' position as to the statute of limitations and the content of the defendants' affidavits as to publication dates.

The district court observed that while the Virginia Supreme Court had not decided whether to adopt the "first-

publication rule," the district court would adopt such a rule, but "giving the plaintiff the benefit of treating the paperback edition as perhaps reaching a different audience so that for publication purposes, the paperback publication would be the date of accrual of the cause of action. But I find that it accrued at the latest on November 20, 1979."

The affidavit of James D. Landis, vice president and editorial director of William Morrow stated in pertinent part:

> 4. That William Morrow began shipping its publication of the book Spooks to its customers --including retail bookstores -- on August 1, 1978. Shipments of Spooks were completed by August 4, 1978 and the book was generally available and sold to the public on or before that date.

The affidavit of Heather Grant Florence, vice president, secretary and general counsel of Bantam Books, stated in pertinent part:

4. That Bantam Books began shipping the book SPOOKS from its DesPlains, Illinois warehouse on November 9, 1979, and that the book was generally available for sale to the public in bookstores throughout the United States on or before November 20, 1979.

These affidavits accompanied the motion to dismiss filed in the present action on January 7, 1982.

Finding that the plaintiff had done nothing to establish a factual dispute as to the date of accrual of the cause of action, the court granted summary judgement because the action had not been brought within one year as required by Va. Code 8.01-248.

II

The main thrust of plaintiff's brief and oral argument is chat he was not given a reasonable time as provided by Federal Rule of Civil Procedure 12(b) to respond to the defendant's affidavit when the Rule 12 motion was converted to a

Rule 56 motion. The last sentence of Rule 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The first sentence of Rule 56(c) provides: "The motion shall be served at least 10 days before the time fixed for the hearing."

The last two sentences of Rule 56(e) state:

> When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgement, if appropriate, shall be entered against him.

Morrissey concedes that this is a matter committed to the discretion of the district judge, but argues that it was an abuse of discretion to not allow him additional time for discovery to counter the statements in the defendants' affidavits and to explore any facts omitted from the affidavits.

The facts do not support this claim of abuse of discretion. It is abundantly clear that plaintiff engaged in no discovery in either his first suit or in the present action. In the original action the motion was set for a hearing on May 29, 1981, and on the day preceding such hearing, the court granted a continuance until June 5, 1981. On that date the court again granted a motion to continue the hearing and allowed plaintiff additional time for discovery, which was not used by the plaintiff, who took a voluntary dismissal on June 9, 1981.

It can be assumed that between June 9, 1981 and the refiling of the case on November 19, 1981, the plaintiff must have given some thought to his lawsuit and how he would respond to the Landis and Florence affidavits. As the trial judge explained to the plaintiff, he could have filed interrogatories immediately upon commencement of the second action. Rule 33(a). But again, nothing was done by the plaintiff.

He argues that during June 1981 he called the offices of one of the defendants to ask for certain information over the telephone. He claimed that he was surprised when defendants' employees did not furnish this information to him by telephone. It is inconceivable that any attorney, admitted to practice in the courts of Virginia and the District of Columbia, as well as the United States District Courts, would expect to obtain

or use information from such a telephone conversation with an adversary.

Morrissey does not claim that he was taken by surprise by the motion to dismiss nor the fact that it was treated as a Rule 56 motion. He filed a 21 page "Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss" in which he discussed Rule 56, but he presented nothing to create an issue of fact.

Plaintiff does not claim that he did not know or believe that he would be required to file counter-affidavits. Nor does he claim that he was denied the opportunity to proceed with the discovery or that he was denied continuance requested from the court. He primarily asserts that he should have been given more time and that the time provided was

not reasonable.[1]

Morrissey's reliance on Johnson v. RAC Corporation, 491 F.2d 510 (4th Cir. 1974) is misplaced. In that case the court found that prejudice had resulted from the unexpected treatment of a motion under Rule 12(b)(6) as a summary judgement motion and the plaintiff had not had a "reasonable opportunity" to file material in opposition to a Rule 56 motion. In Johnson the plaintiff had filed extensive interrogatories which sought to counter the defendant's affidavit, but no discovery was permitted until the motion to dismiss was heard. Thereby the plaintiff was prevented from exercising his rights to discovery which could have produced an issue of fact. By

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[1] Rule 56 does not provide limited time to a party opposing a motion. It requires at least 10 days notice by the movant, but states: "The adverse party prior to the day of hearing may serve opposing affidavits." Rule 56(c).

contrast, Morrissey simply did not use the discovery procedures available to him in either the first suit or the present suit, although he was well aware of the defendants' position as to the statute of limitations and the content of the supporting affidavits. Morrissey, an attorney, knowingly and willfully did not avail himself of the opportunities for discovery, and we cannot say that the district court was in error in finding that he had a reasonable time in which to present affidavits or other materials in opposition to defendants' motion.

In Clarke v. Volpe, 481 F.2d 634 (4th Cir. 1973), this court affirmed the district court's dismissal of the complaint under Rule 12(b)(6) where the defendants submitted affidavits and moved for judgement on the pleadings or, in the alternative, for summary judgement. This court stated:

> The appellate court is not bound by the label that the district court places upon its disposition of the case. Whenever outside matters are presented to and not excluded by the trial court, the motion should be considered on appeal as one for summary judgement even though the trial court characterized its action as a dismissal of the case for failure of the plaintiffs to state a claim upon which relief can be granted. The record reveals that both parties were given a reasonable opportunity to present affidavits and other evidence upon which the trial court could properly determine whether summary judgement should be entered. Only the defendants availed themselves of such opportunity. When such circumstances appear from the record the appellate court, for the sake of judicial economy, should make an immediate determination of the issue rather than remand the case to the trial court for disposition.

481 F.2d at 635-636.

Failure of a litigant to file counter-affidavits may be treated as a conscious waver. See Hummer v. Dalton, 657 F. 2d 621, 626 (4th Cir. 1981), which involved a prisoner proceeding pro se. Morrissey is an attorney knowledgeable in the rules of procedure, who took the time

to prepare a lengthy memorandum of law in opposition to the defendants' summary judgement motion. His failure to conduct any discovery or submit any opposing affidavits in either of his cases, given the time available and the continuances granted, can only be viewed as a waiver of such rights.

"Time and tide wait on no man," and the district court waited long enough for the present plaintiff.

III

Appellant's second point is that based upon the record then before it, the district court erred in finding that the statute of limitations began to run when the books became "generally available" to the public. A large part of this argument is little more than a further complaint that the trial judge did not allow the plaintiff additional time to

"test" the defendants' affidavits. Enough has been said on this point.

The Virginia Supreme Court has consistently applied the one year statute of limitation in Va. Code 8.01-248 to defamation actions. Weaver v. Beneficial Finance Co., 98 S.E. 2d 687 (1957); Watt v. McKelvie, 248 S.E. 2d 826 (1978).

The district court said that it was adopting the single publication rule even though the Virginia Supreme Court had not yet faced the issue. The district court was justified in making this assumption. "The great majority of the States now follow the single publication rule." Keeton v. Hustler Magazine, Inc., 52 U.S.L.W. 4346, 4348 n.8 (U.S. March 20, 1984).

This rule is summarized in Restatement (Second) of Torts § 577A(4) (1977):

> As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered

> in the one action; and (c) a judgement for or against the plaintiff upon the merits of an action for damages bars any other action for damages between the same parties in all jurisdictions.

Since William Morrow published the hardback edition of Spooks and Bantam Books more than a year later published the paperback edition, the district court addressed its attention to the latest date of publication. There is no claim that William Morrow and Bantam Books are affiliated companies and plaintiff does not argue that the act of one is the responsibility of the other. It is alleged that Bantam Books entered into a separate agreement with William Morrow to publish the book in paperback version and thereby Bantam Books restated the malicious falsehoods about the plaintiff. This is not a claim of republication by William Morrow, and it is obvious that from the record before the district court

the hardback publication was shipped to bookstores and sold in August 1978, more than two years before plaintiff's action was brought. The Landis affidavit states that the hardback edition "was generally available to and sold to the public on or before that date." (August 4, 1978). With nothing from the plaintiff to challenge this sworn statement as to the date of sale of the hardback book, there was no dispute as to a material fact and William Morrow was entitled to judgement as a matter of law.

The date of publication for the Bantam Books paperback edition involved a slightly different question.[2] Neither the paperback nor the hardback editions are in the record, but plaintiff's brief states as to the paperback edition "The

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[2] The district court gave plaintiff the benefit of considering the paperback edition as a separate publication for purposes of the statute of limitations.

book itself contains the publication date of December 16, 1979." Argument of counsel is not evidence and although defendants acknowledge an "official publication date of December 19, 1979 printed in the paperback book", it is common knowledge that publications are often in the hands of the public before the date appearing thereon. This is particularly true of magazines. The May issue of a monthly magazine usually arrives on the newsstands and at the homes of subscribers by mid-April. Courts have recognized this as common practice. Hartmann v. Time, Inc., 166 F.2d 127 (3rd Cir. 1947); McGlue v. Weekly Publications, Inc., 63 F.Supp. 744 (D. Mass. 1946); Khaury v. Playboy Publications, Inc., 430 F.Supp. 1342 (S.D.N.Y. 1977).

The use of arbitrary "official publication dates" has been recognized as to books and found not to be determina-

tive of the date of publication. In Fleury v. Harper and Row Publishers, Inc., 698 F.2d 1022 (9th Cir. 1983), cert. denied 52 U.S.L.W. 3264 (Oct. 4, 1983) the court held that the official publication date listed inside the cover of the book is immaterial in determining when the statute of limitations begins to run, stating:

> The precedents with almost complete uniformity hold that publication occurs at the time of actual communication of the libel, not the date on the cover of the newspaper, magazine or other printed matter.

698 F.2d at 1028.

Appellant argues that under Gregoire v. G P Putnam's Sons, 298 N.Y. 119, 81 NE 2d 45, 49 (1948) a test for determining when the statute of limitations begins to run is "when the finished product is released by the publisher for sale in accord with trade practice." Appellant submits that "trade practice"

should have been developed by the district court before granting summary judgement. The record before the district court contained the unchallenged affidavit that the paperback edition was shipped from the warehouse beginning November 9, 1979, and "that the book was generally available for sale to the public in bookstores throughout the United States on or before November 20, 1979." There was no reason to develop a record on "trade practice" when there was no challenge to the sworn statement that the books were available to the public in bookstores throughout the United States on or before November 20, 1979.

Morrissey submits that there were "a whole host of questions" to be resolved by the district court before deciding the statute of limitations issue. However, the district court was confronted with the single issue of the date of publica-

tion and properly resolved this issue based upon the unchallenged sworn statement that this date was not later than November 20, 1979.

IV

Plaintiff's last claim is that the trial court erred in failing to consider the possible conflict of law situation presented in his claim for invasion of privacy. He argues that the common law right of invasion of privacy is recognized in the District of Columbia and since he had contacts in the District of Columbia this cause of action should have been recognized.

Virginia has rejected the "most significant relationship" test and applies the substantive law of the place of the wrong. McMillan v. McMillan, 219 Va. 1127, 253 SE 2d 662 (1979). Plaintiff resides in Virginia, practices law

in Virginia, alleges he suffered damages in Virginia and brought his two actions in the United States District Court for the Eastern District of Virginia. There was no reason to consider a conflicts problem, and even if one had been considered, plaintiff's "most significant contacts" were in Virginia.

Under the present facts to allow the plaintiff one more chance to create a factual issue and avoid summary judgement would do violence to Rule 56 and the other Federal Rules of Civil Procedure.

AFFIRMED.

[Footnotes to the following dissent opinion appear in sequence at the conclusion of the opinion]

MURNAGHAN, Circuit Judge, dissenting:

My dissent is not addressed to the bulk of the majority opinion. I too am completely of the view that the plaintiff's complaints about inadequacy of opportunity on his part to conduct discovery were ill-founded. On the contrary, he was afforded ample time to develop the facts, but he represented himself poorly and demonstrated why the legal profession as a whole takes a very dim view of the prudence or likelihood of success when a lawyer undertakes to plead his own case.[1/]

My disagreement with the majority lies rather in the conclusions of law to be reached even assuming that everything asserted factually by the defendants was properly taken as proven, the plaintiff having offered no material to contradict the affidavits of the defendants or to

develop facts other than those brought forward by the defendants. Impatience with a lawyer's brought forward by the defendants. Impatience with a lawyer's inadequate performance should not blind our minds to the evident proposition that the factual posture of the case, even when taken fully from the defendants' point of view, does not afford a legal justification for denying the plaintiff a trial.

My major point of departure from the majority centers around the provisions in the affidavits filed by the defendants relating to the crucial subject off extent of distribution. In the case of the hardback edition produced by William Morrow & Co., Inc., the affidavit established that copies of the book were "generally available and sold" (emphasis supplied) on or before August 4, 1978, more than a year (indeed, more than two years) before suit was filed. The hardback edition consequently was manifestly published

outside the time fixed in the applicable statute of limitations, namely, a period of one year. Va. Code 8.01-248 (1977 Repl. Vol.) fixes one year for causes of action for which no other limitation fixed by statute is provided. Included in that category are not only defamation but invasion of privacy and injurious falsehood as well.

In striking contrast, however, the paperback edition was only asserted in the executed affidavit to have been "generally available for sale" on or before November 20, 1979 (one year and eleven days before suit was filed).

The history of that substantially different affidavit merits some attention. An unexecuted and undated affidavit included in the file parrotted the language of the William Morrow affidavit and stated that the paperback edition of the book had been sold on or before November 20, 1979. However, being unexecuted, the document was

a nullity. Moreover, another, substitute affidavit, fully executed by an executive officer of Bantam Boos, dated May 27, 1981, merely stated that the book was "generally available for sale" on or before November 20, 1979. There is literally nothing to establish that a sale ever took place, before December 1, 1979, or, indeed, that any other occurrence constituting publication, such as free distribution to a critic, occurred. A book though printed is not published simply because it is "available." Evidence that it has been read by some member of the public is required. As the Court in Hartmann v. Time, Inc., 166 F.2d 127, 132, 135 (3d Cir. 1947), was careful to point out: "The . . .Legislature of Pennsylvania can scarcely have intended the mere printing of a libel, without the publishing of it, to start the limitation period running." It went on to announce that "we cannot doubt

but that the magazine was read by persons not privileged in Illinois prior to January 17, 1944."

To me, on summary judgment, where conflicting inferences as well as statements of fact are to be construed against the party seeking summary judgment, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co., 381 F.2d 245, 249 (4the Cir. 1967), the record, as it now stands, would support a jury finding that no single copy of the paperback version of the book had been sold or, indeed, otherwise distributed so as to reach a member of the public. Indeed, it is hard to read the deliberate change in the contents of the affidavit to delete any reference to a sale of the books as other than an acknowledgement that the provider of the affidavit was unaware of the sale of any book, certainly at least, any sale more than a year prior to the filing of suit.

It is a simple proposition, indeed, that publication is what commenced accrual of an action for defamation and associated torts, Fleury v. Harper & Row Publishers, Inc., 698 F.2d 1022, 1027 (9the Cir. 1983), citing Restatement (Second) of Torts, §§558, 577 (1977), and publication simply has not been made out insofar as the paperback edition is concerned.

Counsel for the defendants were candid with the Court in frankly acknowledging that the single publication rule[2/] does not extend its scope so far as to have publication for a first edition also count as publication for a separate, second edition. Counsel for defendants also conceded that the paperback version of Spooks was not merely a reprinting of the first edition, but rather a veritable second edition.[3/]

For those reasons, the conclusion to which I come is at odds with that of my respected panel colleagues. It remains to set out in some detail why that is so.

At early common law, of course, before the advent of widespread reproduction and frequent publication taking place over large areas, each copy of an item appearing more than once was considered to be a separate publication, with each starting the statute of limitations running all over again. See Duke of Brunswick v. Harmer, 14 Q.B. 185 [849], 117 Eng. Rep. 75; Note, The Single Publication Rule in Libel: A Fiction Misapplied, 62 Harv.L.Rev. 1041 (1949):

> Traditionally, libel consists in the unprivileged communication of defamatory matter to a person other than the defamed; each such communication constitutes a publication, and each publication gives rise to a separate cause of action. Thus it is said that a new cause of action accrues on the sale of each copy of a defamatory book, newspaper, or magazine.4/

The defendants, however, rightfully in the view of the members of the majority and of myself, assert that the single publication rule, developed in the

relatively recent past, has supplanted for widely distributed books, magazine and newspapers the older view of the common law. Still in a state of evolution,[5] and neither definitively accepted nor rejected in Virginia, the single publication rule operates to modify the early common law and to protect the promulgation in large multiples of the same book, magazine, or newspaper from exposure to a separate, distinct and independent lawsuit based on every one of the identical items.[6] The district judge adopted, but, in my understanding of the law, misapplied the single publication rule.[7]

Perhaps it should be enough to stop there with the observation that, even under the strictest extant version of the single publication rule, a statute of limitations defense has not been made out as the record now stands, so that reversal, properly, is required. However, there remains a closely related potential for

error which should be mentioned so that it can be avoided. The case should not be decided for the defendants on summary judgment even if, upon reversal, Bantam Books were to supply uncontradicted evidence, by affidavit or otherwise, that a copy (albeit perhaps no more than one) had been sold before December 1, 1979. As a matter of definition, there need, for invocation of the single publication rule, to have been multiple publication. The total lack of information in defendants' affidavits as they now stand, or as they might be amended to bring that of Bantam Books in line with that of William Morrow, as to number of sales should be recognized as a factor making it impossible to determine whether the events making up the distribution of Spooks call into play the single publication rule.

Generally, we described the rule as applicable to books. However, we do so not simply because the publication is in

book form, but, rather, because it has been widely circulated.[8/] Here, however, we have, at the most, eleven days (from November 20, 1979 to November 30, 1979) in which the defendants would have been able to establish sufficient publication (the getting of Spooks into the hand of readers) to merit the calling into play of the single publication rule. They simply have not been done so. While I am not willing to regard the question as open in respect to the hardback edition, a minimum of one copy having been sold more than two years prior to the filing of the plaintiff's action, and a second edition have been deemed warranted, indicating some success, it is otherwise for the paperback edition. It must be borne in mind that counsel for the defendants stated at oral argument that the book had not been a commercial success, inferring that sales had not been in large numbers.[9/] For the first eleven days of its "available" status, the paperback

edition of Spooks may not have sold at all, or its sales may have been negligible.10/

To sum up, I am not aware of any case supporting the defendant's assertion that "availability for sale," regardless of whether any sales iin fact have taken place, is the criterion for determining the date of accrual for limitations purposes. See the Annotation, What Constitutes "Publication" of Libel in Order to Start Running of Period of Limitations, 42 A.L.R.3d 807, 817 n.1 (1972):

> It is difficult to state whether or not the principle that publication occurs upon release for sale in accordance with trade practice is necessarily inconsistent with the one . . .that publication occurs upon mass sale and distribution to the public.

In Moon v. CBS, Inc., Circuit Court of the City of Richmond, No. LD 1544 (June 29, 1980), a Virginia lower court case applying the single publication rule, the court called for proof that the book was

"available and communicated to the public," i.e., published, that is to say, sold or otherwise actually distributed. In Hartmann v. Time, Inc., 166 F.2d 127, 132, 135 (3d Cir. 1947), it was held that accrual occurs where a large distribution is involved "when the issue goes into circulation generally." Cf. Fleury v. Harper & Row Publishers, Inc., 698 F.2d 1022, 1027 (9the Cir. 1983), cert. denied, 52 U.S.L.W. 3274 (U.S. 1983), a case applying the single publication rule, where it is acknowledged: "A cause of action for defamation does not arise until there has been an unprivileged publication of the libel to a third party."

Some of the cases coming down in jurisdictions other than Virginia purporting to apply the single publication rule seem to have uncritically lumped together two rather separate concepts, without appearing to appreciate that one of them does not dictate the other. It by no

means follows, however, that Virginia would do so too. The fact that but one publication may be deemed to have occurred, so that numerous suits, each on a different copy of the same newspaper, magazine or book, may not or need not be brought, does not even indicate, and certainly does not impose, a requirement, for statute of limitations purposes, that the earliest individual item to appear shall determine when the single publication occurred, thereby fixing the date of accrual of the action.[11/] Note, The Single Publication Rule in Libel: A Fiction Misapplied, 62 Harev. L. Rev. 1041:

> . . .there has been an increasing tendency to employ this single-publication fiction for purposes beyond those for which it was originally devised, and to situations where the concept is a complicating and often misleading factor.

Id. at 1042.

> . . .a publisher with malicious inclinations could still print a great many

> copies of a libelous article, distribute a few, and, after the statutory period had elapsed, distribute the remainder with impunity. The inequities of beginning the statute of limitations with the first communication of the defamation are more apparent in cases involving libel by books than by newspapers or magazines. . .

Id. at 1043.

> The harsh results occasioned by a single-tort construction of the statute of limitations in the peripheral cases previously considered seem unjustified if the defendant can by other means be adequately protected against multiple suits. . . .

Id. at 1044.

> The term "single publication" was at its inception merely a convenient tool to express the rule that all causes of action for widely circulated libel must be litigated in one trial, and that each sale need not be separately pleaded and proved. By a process of formal logical extension, it has been invoked for purposes where the advisability of its application is questionable . . . .

Id. at 1049.

> While there are cases which had, almost sub silentio, converted "single" publication to "first" publication[12/] there are also cases accepting what appear to be more reasoned approaches.[13/]

It seems to me quite possible that, event if ultimately enough copies of Spooks were sold to bring at some time the single publication rule into play, nevertheless the correct date to choose for accrual purposes--i.e., for the commencement of the running of limitations--would not be the earliest date on which even a single copy was sold or otherwise distributed to a member of the public, but rather would be the first date by which a sufficient number had been published to render the single publication rule applicable.

Furthermore, if it should turn out that there were sufficient copies of the paperback version of Spooks published

before December 1, 1979 to establish that the single publication rule, for limitations purposes, would normally be applied as of a date prior to December 1, 1979, there will remain for resolution the question of the significance of the printed dated of publication, sometime in December 1979, appearing on the copies of the paperback edition. If it were to control, for accrual purposes, obviously the suit, commenced December 1, 1980, would have been timely.

It is, of course, common knowledge that magazines customarily show a later "official" publication date than the actual one. First reaching the news stands in mid-October, a magazine may describe itself as the November issue. The practice probably is designed to give an appearance of timeliness even to copies which, first picked up and read in late November, may in fact be sadly dated. Perhaps such considerations led the court in McGlue v.

Weekly Publications, Inc., 63 F. Supp. 744 (D. Mass. 1946) to conclude, so far as the widely disseminated magazine Newsweek was concerned, that, for single publication rule purposes, the actual date of appearance and sale and not the ostensible date published on the magazine should control. However, Newsweek has had enormous readership, and it would have been reasonable for the court to have taken judicial notice of general awareness of the unreliability of the "official" issue date, so far as Newsweek was concerned, to ascertain when publication first occurred.[14/]

Customary facts respecting books may be the same, but they may just as well be different, from those for magazines.[15/] We know, for summary judgment purposes at least, that the book Spooks did not enjoy commercial success, and that it was not widely sold. Additional facts are needed to ascertain,

in the case of Spooks, whether Bantam Books, the publisher for the paperback edition of that book, and for other books brought to market by it, as a customary matter, consistently chose an unrealistically late date when designating the time at which publication was expected to occur.[16/] Details so far lacking as to whether the plaintiff knew, or should have known, of the practice would also be necessary to permit intelligent analysis and resolution of the issue of whether the publisher was stopped from asserting a publication date different from the very one which it has asserted. We do not know, as things stand now, when news of the appearance of the paperback edition of Spooks first came to the plaintiff's attention.

All in all, both sides have participated in a presentation of facts too inadequate to permit as yet decision as to whether, and, if so, to what extent, an

embossed later publishing date can be ignored in favor of the earliest date on which a multiple publication in fact has come to market.[17/] For example, many daily morning newspapers of wide circulation publish limited bulldog editions, copies of which appear on the streets and are sold prior to midnight and, therefore, on the day before the date set out in the masthead. It seems in those circumstances unlikely that the customary one year statute of limitations for defamation will automatically be reduced to 364 days because of a non-negligible, but certainly not primary distribution on the day prior to the date on which the newspaper principally is sold.[18/] In the same fashion, if the bulk of the publication of the paperback edition of Spooks occurred only on or after December 1, 1979, thus conforming to the printed "official" publication date, perhaps that date should be selected as the

one on which accrual for limitations purposes first took place.

If it were determined, as I believe it should be, that, at the present state of development of the record, a judgment in defendants' favor on statute of limitation grounds would be unwarranted, we must consider not only the defamation claim but also the other tort claims asserted by the plaintiff as well.[19/] First the claim for invasion of privacy under Virginia law will simply not bear investigation. Regardless of limitations questions, a substantive claim has simply not been made out. The plaintiff has not, as apparently he could not, have proceeded under the Virginia statute. Va. Code §8.01-40 (1977 Repl. Vol.). Yet Virginia authority, binding on us in a diversity case, does not recognize a common law, as distinguished from a statutory, cause of

action for invasion of privacy. Brown v. American Broadcasting Co., Inc., 704 F.2d 1296, 1302-03 (4the Cir. 1983).

Furthermore, there is no occasion to investigate, particularly in connection with the invasion of privacy count, the question of whether District of Columbia tort claims exist in favor of the plaintiff which could be asserted in an action commenced in the United States District Court for the Eastern District of Virginia. It might prove a tortured inquiry. In a perceptive law review publication, Note, The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem, 60 Harv. L. Rev. 941 (1947), the author canvasses several possibilities, among them (a) recovery on a distinct cause of action for each state, applying the law of each state and (b) recovery simply and solely under the law of the plaintiff's domicile. He points out the advantages and disadvantages

of each possibility, concluding that none is perfect. "Neither a double choice for the plaintiff, a double choice for the distributor, nor a harshly monistic application of the domiciliary law seems satisfactory." Id. at 951.

However, assuming, but not deciding, as the plaintiff asserts, that a cause of action might have been sufficiently pleaded under the substantive law of the District of Columbia, if and to the extent the alleged invasions of the right of privacy took place in the District, the fatal defect in the complaint lies in the absolute failure to assert any occurrences whatever in the District of Columbia. While it is appropriate to conclude that a complaint by a Virginia resident, filed in a United States district court which functions in Virginia inferentially alleges Virginia events, see, e.g., Restatement (Second) of Conflict of Law §150(2) (1971) ("When a natural person

claims that he has been defamed by an aggregate communication, the state of the most significant relationship will usually be the state where the person was domiciled at the time . . .), it is not justifiable simply to assume, absent any support allegations, the existence of occurrences constituting an invasion of privacy in the District of Columbia, 49 other states, Canada and perhaps the remainder of the civilized world. See generally, Id., §153, Comment B.

Finally, and the consideration applies to the defamation and injurious falsehood claims as well as to invasion of privacy, the statute of limitations in the present action in the Virginia district court is for every count one year. There being no common law invasion of privacy tort in Virginia, no other time limit, obviously, is set for it. Any allowance of an amendment to plead torts alleged to have occurred in the District of Columbia would

still have to satisfy the one year statute of limitations, counting from December 1, 1980. Relation back should not be permitted for, if an amendment to declare on distinct and independent D.C. torts were allowed, that new pleading should meet its own limitations requirements. Fed. R. Civ. P. 15(c); Jackson v. Ideal Publishing Corporation, 274 F. Supp. 318, 320 (E.D. Pa. 1967) ("Thus to permit plaintiff to amend . . .would be an allowance to amend around the statute of limitations."). Counting from some date in 1984 the likelihood that publication happened on or after a date in 1983 is too unlikely to be given credence. Of course, all this is said without prejudice to institution by the plaintiff in the District of Columbia of an action if the limitations bar of that jurisdiction has not yet arisen.

There remains the injurious falsehood claim. The story, as it has been developed in the pleadings to date, remains

far too incomplete to judge whether, assuming that limitations have not run, a cause of action for injurious falsehood also exists in Virginia. Decisional law and statute are both silent on the subject. They say neither "Yea" nor "Nay". That means only that neither the court, nor the parties, have located any Virginia decision either recognizing, or refusing to recognize, such a cause of action. However, the fact that a blatant lie is not defamatory should not preclude recovery if it in fact harms and especially if it has been uttered by a defendant intending to injure.[20/] Thus, one competitor for a job might speak or write of another that he or she is lacking one controlling qualification. He might assert nonage of someone actually 21 years (or now customarily 18 years) of age. He might claim that the other person was too tall or too short, thereby failing to meet a controlling size requirement for the job.

The knowing lie would not defame, but if the plaintiff could prove that he would have been the one hired, absent the deliberate misstatement of fact, he should be permitted to recover. See Prosser supra, §128, pp. 915-926.

No reason readily appears why Virginia law would not so hold. The common law jurisdictions having had occasion to consider the matter have generally accepted the existence of injurious falsehood as a viable tort. The fact that the question has never come on for decision in the Commonwealth is scant reason for denying the existence of a cause of action. There must be a first time for nearly everything. Consequently, if the actual words relied on as constituting an inexcusable falsehood should, when pleaded, turn out to constitute a lie, especially a deliberate lie, it is quite possible that the cause of action, having reared its head

for the first time in Virginia, is indeed viable in the Commonwealth.

For the reasons advanced, I would reverse. At the same time, I should not wish to appear unsympathetic to a district judge dealing with an inept performance by counsel for one of the parties (the plaintiff himself). In the event of remand the district judge would surely be possessed, in case of a similar inadequate performance, of plenary power to dispose finally of the case without exceeding his discretionary powers, and, especially, without further amendment beyond that contemplated in this opinion.

At the same time, it should be ignored that defendants' counsel did not do all in their power to make matters easier for the district judge to understand. Perhaps, if counsel belatedly brought into the case to represent the plaintiff on appeal were to remain, and were the case

reversed and remanded, such egregious inadequacies in lawyerlike performance would be avoided.

1/ Also, for reasons not quite in accord with those expressed in the majority opinion, I concur in the decision that summary judgment in defendants' favor should be affirmed on the plaintiff's claim of invasion of privacy.

2/ I am in complete accord with the majority's holding that Virginia, when occasion arises, will adopt the single publication rule. My differences stem from perceptions of what the single publication rule is exactly, and when and how it is to be applied.

3/ By itself, admittedly, the first, hardback edition is not actionable because of the lapse of more than one year since publication. While, in abstract theory, it might be argued that the William Morrow affidavit is ambiguous as to how many copies had been sold in the period more than a year before December 1, 1980, and, therefore, the volume of sale was insufficient to invoke application of the single publication rule, plaintiff's inadequate representation of himself cannot be excused of all its consequences. More than two years elapsed from August 4, 1978 before suite was brought. The publishers deemed a second edition warranted. The reed is simply too thin to keep the case alive on that theory of insufficient publication to invoke the

single publication rule, bearing in mind that the plaintiff has done absolutely nothing to show that sales between August 4, 1978 and December 1, 1980 were trivial to the point of rendering application of the single publication rule inappropriate.

Nevertheless, bearing in mind that the case is at the relatively early stage of a motion for summary judgment, where the facts presented were altogether silent, one way or the other, with respect to possible interconnection between William Morrow and Bantam Books and the interrelationships between the two publications, one of the hardback edition, the other of the paperback edition, it is inappropriate, as I view matters, to allow summary judgement in favor of William Morrow if summary judgment is inappropriate for Bantam Books.

That conclusion would not, however, were summary judgment held to have been erroneously granted, preclude in any way renewal by William Morrow of its motion with adequate supporting affidavits or other substantiating materials demonstrating that it was in no way responsible for the paperback edition.

4/ We deal, of course, with problems growing out of repeated publications by the defendants, not with republications by third parties, which may or may not be natural consequences of the original publications. See Weaver v. Beneficial Finance Co., 199 Va. 196, 98 S.E.2d 687 (1957).

5/ See Note, The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem, 60 Harv. L. Rev. 941 (1947).

6/ The single publication rule constitutes a departure "from the conventional law of libel." Hartmann v. Time, Inc., 166 F.2d 127 (3rd Cir. 1947).

7/ He treated publication as having taken place for statute of limitations purposes, for all versions of the later paperback edition, on November 20, 1979. He said: "That [November 20, 1979]'s the date of publication. That's the date the action accrued." He further stated: "I am adopting the first-publication rule."

Yet I fail to perceive any proof of actual publication in the affidavit's assertion that the paperback was "available for sale." The bullet in the revolver's chamber is available for firing, yet actual discharge of the weapon may never take place.

8/ Many of the cases invoking the single publication rule simply assume, because, on their particular facts, it was self-evident, that distribution of multiple copies to readers, leading to heavily publication must have taken place.

9/ Buttressing that conclusion, the defendants in their answers to the Complaint flatly denied that the copies of Spooks had been widely disseminated, advertised, distributed, promoted, and sold.

10/ What we manifestly do not have are details as to when sales first occurred, where such sales took place, the number of volumes in the initial sale and all subsequent ones, if any, through November 30, 1979. The only estimate as to the number necessary to constitute a publication a mass publication, bringing the single publication rule into play, may have been one appearing in Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 124, 81 N.E.2d 45, 47 (1948) of "thousands of readers." The Gregoire court spoke of release on a given date to the public of "thousands of copies of a single printing or impression." In stating the rule, the court alluded to a publication of "thousands of copies widely distributed."

11/ Cf. Zuck v. Interstate Publishing Corp., 317 F.2d 727, 729, 735 (2d Cir. 1963) (accrual began when "a contemporary magazine of wide circulation" "first appeared on the newstands for sale to the public, rather than on the date of shipment by common carrier to wholesale distributors").

12/ Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1947) (Wide distribution throughout the civilized cou9entries of the world in large numbers of an issue of Life magazine by no later than January 14, 1944 was held to bar an action commenced onJanuary 17, 1945); Gregoire v. G.P. Putnam's Sons, 298 N.Y. 119, 81 N.E.2d 45 (1948) (ales of no fewer than 12,300 copies over 2-1/2 years before suit was instituted; the statute of limitations was one year);

Cassius v. Mortimer, 101 F. Supp. 74 (S.D.N.Y. 1957), affirmed per curiam without opinion, 252 F.2d 459 (2d Cir. 1958) (A diversity action perforce applying New York law involved a book 99% distributed to the trade more than 3-1/2 years before suit was brought. The statute of limitations was one year. The plaintiff's sole contention was that limitations should not be governed by the single publication rule. He manifestly was in no position, in light of the long delay to contend, as the plaintiff may be able to do here, that, although the single publication rule did apply, still a year had not passed from the date on which accrual occurred).

13/ Dominiak v. National Enquirer, 439 Pa. 222, 266 A.2d 626 (1970) (rejecting the initial publication as the one constituting accrual, the majority opting for any one publication, but restricting recovery to damages for those appearing within one year prior to the date of filing suit. One concurrer, of 7 judges, selected as the accrual date the time when the publication reaches the allegedly defamed individual's community. Two others preferred the date of first publication in the state in which suit is brought.); Wildman v. Hustler Magazine, Inc., 508 F. Supp. 87, 91 (N.D. Miss. 1980) (". . .the cause of action for libel in a mass distributed publication accrues when the periodical is substantially distributed to the public. . ."') (emphasis supplied).

14/ Cf. Hartmann v. Time, Inc., 166 F.2d 127, 135 (3d Cir. 1947):

> We are aware that the plaintiff makes the argument that the defendant's affidavits do not show that there was a reading of the accused material prior to January 17 [the "official" publication date stated on copies of the issue of the magazine], and that since there is no proof of publication in the legal sense prior to that date, the motion for summary judgment pursuant to Rule 56 should not have been granted. We are not willing to dispose of the motion on such a narrow ground. We cannot believe, in view of the great number of magazines which comprised the issue, that "Life" dated January 17 was not read by persons not privileged within the two or three days which followed its very widespread distribution. To hold otherwise would be totally unrealistic and would inflict a wooden and a senseless interpretation on Rule 56.

Cf. also Winrod v. Time, Inc., 334 Ill.App. 59, 78 N.E.2d 708 (1948) (also dealing with an issue of the widely disseminated Life magazine published 2 days before the date printed on the cover).

The important distinction from the present case lies in the evident fact that widespread distribution of Spooks,

prior to December 1, 1979, has not been established.

15/ Consider Khaury v. Playboy Publications, Inc., 430 F. Supp. 1342, 1344 n.1 (S.D.N.Y. 1977) where an issue of the magazine OUI bore a publication date of October 1975, but an on-sale date of September 4, 1975 was designated. A total of 1,779,990 copies were distributed to the public well before September 22, 1975. Suit was filed on September 22, 1976. In refusing to give effect to the official publication date, the court declined to rule "that the industry-wide practice of posting-dating magazines constitutes 'active concealment.'"

16/ Defendants places reliance on Fleury v. Harper & Row Publishers, Inc., 698 F.2d 1022 (9the Cir. 1983), cert. denied, 52 U.S.L.W. 3264 (U.S. 1983) as rendering the "official" publication date for a book immaterial. However, the publisher abided byits prognosis of a November 1978 release date, subsequently made more specific as November 9, 1978. On or before November 14, 1978 shipment of 30,000 copies had been made, and by November 14, 1978 display, delivery, communication and sale in New York City had occurred. Suit commenced on November 16, 1979 was therefore time-barred, and the publisher's disclosure rendered practically impossible the reliance needed to generate an estoppel for the date of December 25, 1978 selected by the author as the "official" publication date.

17/ Certainly Moon v. CBS, Inc., supra, is not dispositive since there the official publication date was October (exact date unspecified) of 1979. Suit was not instituted until October 22, 1980, so the chances were better than 2 to 1 that limitations had run even if the plaintiff was entitled to rely and did rely on the official publication date. In Moon, a lulling into false security, and hence any basis for estoppel in the plaintiff's favor, consequently, were lacking. We need, for purposes of the case sub judice, yet to know the facts before addressing any such question.

18/ See, however, Belli v. Roberts Bros. Furs, 240 Cal. App. 2d 284, 49 Cal. Rptr. 625 (1966). The case has limited relevance, however, depending, as it did, on a peculiarity of wording of the California Uniform Single Publication Act, and concerning, not a newspaper publisher, but a non-news media defendant.

19/ Plaintiff has not spelled out the actual words complained of as libelous, merely alleging that they were "false," "malicious," and "concerning the plaintiff." Defendants, however, did not seek greater precision or clarity under Fed. R. Civ. P. 12(e). They have not contended that the words were not libelous. Therefore, no issue exists, at this stage of the proceedings, as to whether substantively an actionable case of defamation has been made out. See, e.g., United States v. Chesapeake & Ohio Rr., 215 F.2d 213, 216 (4the Cir. 1954).

20/ Words not defamatory in themselves may support a recovery if, by proper, incorporation into the complaint of inducement or colloquium, topped off with an indicative innuendo, the plaintiff pleads that the words were defamatory in application and so understood by the defendant. The fact that in actions for libel recovery of general damages has been greatly circumscribed, see e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), is no reason for concluding that there is no injurious falsehood cause of action in Virginia. For the cause of action for injurious falsehood has always required the proof of actual damages. See, e.g., Prosser, W., Law of Torts, §128, pp. 915 ff. (4the Ed. 1971) (". . .in every case the plaintiff must prove special damage, in the form of loss of a present or prospective advantage, . . ." Id, at 917).

In other words, it does not follow that, where injury proceeds from the use of words because of their untruthfulness rather than their libelous content, and harm is demonstrated to have occurred, recovery is barred. Quite to the contrary, the law customarily supplies a remedy to right a wrong.

In short, the reason advanced by the defendants as to why Virginia should be deemed not to recognize the tort of injurious falsehood is simply that the cause of action, wherever it appears, is a rarity. The defendants advance no grounds for the proposition that a deliberate and injurious lie about a plaintiff resulting in demonstrable harm should not suffice to justify recovery.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHAEL J. MORRISSEY, Plaintiff,	)	APPENDIX B
v.	)	Civil Action No. 81-1106-A
WILLIAM MORROW AND COMPANY, INC., et al., Defendants.	)	

C R D E R

For the reasons stated from the bench, it is hereby

ORDERED that the defendants' plea of the statute of limitations is granted, and this action is dismissed.

(Signed)

United States District Judge

Alexandria, Virginia

February 12th, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MICHAEL J. MORRISSEY, Plaintiff,	)	APPENDIX C
v.	)	Civil Action No. 1165-80-A
WILLIAM MORROW AND COMPANY, INC., et al., Defendants.	)	

AFFIDAVIT OF JAMES D. LANDIS

James D. Landis first upon oath duly sworn deposes and states as follows:

1. That he has personal knowledge of the facts contained herein and is competent to testify thereto.

2. That he is the Vice President, Editorial Director of the defendant William Morrow and Company, Inc. (William Morrow) and that he has held this position at all times relevant to the subject matter of the complaint in the above-referenced civil action. He is authorized to make this affidavit on behalf of William Morrow.

3. That in the course of his duties with defendant William Morrow, he was directly assigned editorial responsibility for William Morrow's publication of the hardcover version of Spooks: The Haunting of America - The Private Use of Security Agents (Spooks).

4. That William Morrow began shipping its publication of the book Spooks to its customers -- including retail bookstores -- on August 1, 1978. Shipments of Spooks were completed by August 4, 1978 and the book was generally available and sold to the public on or before that date.

[Affidavit filed unexecuted]
James D. Landis

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

SUBSCRIBED AND SWORN to before me this ____ day of _____, 1981.

_____
Notary Public

My Commission expires
on _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MICHAEL J. MORRISSEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	1165-80-A
WILLIAM MORROW AND COMPANY, INC., et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF HEATHER GRANT FLORENCE

Heather Grant Florence first upon oath duly sworn deposes and states as follows:

1. That she has personal knowledge of the facts contained herein and is competent to testify thereto.

2. That she is the Vice President, Secretary & General Counsel of the defendant Bantam Books, Inc. (Bantam Books) and that she has held this position at all times relevant to the subject matter of the complaint in the above-referenced civil action. She is authorized to make this affidavit on behalf of Bantam Books.

3. That Bantam Books published a paperback version of the book, Spooks: The Haunting of America - The Private Use of Secret Agents (Spooks).

$ (sic) That Bantam Books began shipping the book Spooks from its Chicago, Illinois warehouse on November 9, 1979, and the book was generally available and sold to the public in bookstores throughout the United States on or before November 20, 1979.

[Affidavit filed unexecuted]
Heather Grant Florence

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

SUBSCRIBED AND SWORN to before me this ____ day of _____, 1981.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MICHAEL J. MORRISSEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	1165-80-A
WILLIAM MORROW AND COMPANY, INC., et al.,	)	
	)	
	)	
Defendants.	)	

SUPPLEMENTAL FILING OF AFFIDAVITS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants William Morrow and Company, Inc. and Bantam Books, Inc. file the attached affidavits executed by James D. Landis and Heather Grant Florence to support the Defendants' Motion for Summary Judgment previously filed herein. The attached affidavits are substitutes for the unexecuted affidavits originally filed with the motion for summary judgment. Minor changes to the unexecuted affidavit of Heather Grant Florence were made by affiant.

/s/

Douglas K. Spaulding
8604 Cromwell Drive
Springfield, Virginia 22151
978-8347

BAKER & HOSTETLER

By /s/
Bruce W.Sanford
818 Connecticut Ave., N.W.
Washington, D.C. 20006
861-1500
Attorneys for Defendants
William Morrow and Company,
Inc. and Bantam Books, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered on this 28th day of May, 1981, to Michael J. Morrissey, Esquire, Suite 450, 600 New Hampshire Avenue, N.W. Washington, D.C. and Lawrence H. Schwartz, Esquire, 1825 K Street, N.W. Washington, D.C. 20006.

/s/

Douglas K. Spaulding

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MICHAEL J. MORRISSEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	1165-80-A
WILLIAM MORROW AND COMPANY, INC., et al.,	)	
	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF JAMES D. LANDIS

James D. Landis first upon oath duly sworn deposes and states as follows:

1. That he has personal knowledge of the facts contained herein and is competent to testify thereto.

2. That he is the Vice President, Editorial Director of the defendant William Morrow and Company, Inc. (William Morrow) and that he has held this position at all times relevant to the subject matter of the complaint in the above-referenced civil action. He is authorized to make this affidavit on behalf of William Morrow.

3. That in the course of his duties with defendant William Morrow, he was directly assigned editorial responsibility for William Morrow's publication of the hardcover version of Spooks: The Haunting of America - The Private Use of Security Agents (Spooks).

4. That William Morrow began shipping its publication of the book Spooks to its customers -- including retail bookstores -- on August 1, 1978. Shipments of Spooks were completed by August 4, 1978 and the book was generally available and sold to the public on or before that date.

/s/
James D. Landis

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

SUBSCRIBED AND SWORN to before me this 26th day of May, 1981.

/s/
Notary Public

My Commission expires
on _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MICHAEL J. MORRISSEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	1165-80-A
WILLIAM MORROW AND COMPANY, INC., et al.,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF HEATHER GRANT FLORENCE

Heather Grant Florence first upon oath duly sworn deposes and states as follows:

1. That she is the Vice President, Secretary & General Counsel of the defendant Bantam Books, Inc. (Bantam Books) and that she has held this position at all times relevant to the subject matter of the complaint in the above-referenced civil action. She is authorized to make this affidavit on behalf of Bantam Books.

2. That she has personal knowledge of the facts contained herein and is competent to testify thereto.

3. That Bantam Books published a paperback version of the book, SPOOKS: THE HAUNTING OF AMERICA - THE PRIVATE USE OF SECRET AGENTS (SPOOKS).

That Bantam Books began shipping the book SPOOKS from its Des Plains, Illinois warehouse on November 9, 1979, and that the book was generally available for sale to the public in bookstores throughout the United States on or before November 20, 1979.

/s/
Heather Grant Florence

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

SUBSCRIBED AND SWORN to before me this 27th day of May, 1981.

/s/
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MICHAEL J. MORRISSEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	81-1106-A
WILLIAM MORROW AND COMPANY, INC.	)	
	)	
and	)	
	)	
BANTAM BOOKS, INC.,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

Defendants William Morrow and Company, Inc. and Bantam Books, Inc. by their attorneys move the Court for entry of an order dismissing the above-captioned action against them and as grounds therefor refer to the Memorandum of Points and Authorities attached hereto and incorporated herein.

/s/

Douglas K. Spaulding
8604 Cromwell Drive
Springfield, Virginia 22151
978-8347

BAKER & HOSTETLER

By /s/
Bruce W. Sanford
818 Connecticut Ave., N.W.
Washington, D.C. 20006
861-1500

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss was mailed, postage prepaid, this 6th day of January, 1982, to Michael J. Morrissey, Esquire, 6647 Midhill Place, Falls Church, Virginia 22043.

/s/
Douglas K. Spaulding

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MICHAEL J. MORRISSEY)
)
Appellant,)
)
v.) Court of Appeals
) No. 82-1213
WILLIAM MORROW &)
COMPANY, et al)
)
Appellees.)

APPENDIX D

INFORMAL BRIEF OF APPELLANT

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper if they are necessary. You need not limit your brief solely to this form but you should be certain that

whatever you file answers the questions below. In either case, the Court prefers short and direct statements. You should return your original brief and one copy to the above address within 21 days of the date noted above and mail another copy to the opposing party.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

   Yes. The district court granted defendants' Motion to Dismiss solely on the basis of a Statute of Limitation defense asserted. This was done before any discovery had even commenced in the case. The most important ground for relief the court failed to consider was the

plaintiff's right to conduct necessary discovery to establish in the record the necessary facts that would show the true date as to when the limitation period commenced to run.

2. Did the district court incorrectly decide the facts? If so, what facts?

Yes. The district court incorrectly decided that the limitation period started to run on November 19, 1979. This decision was made solely on two affidavits of defendant employees that were attached with its Motion. This was in error for plaintiff should have been given opportunity for cross-examination of the affiants, and for conducting further

discovery as necessary to establish the proper factual record in the case prior to making such a summary ruling.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

The district court applied Virginia's one-year Statute of Limitations to Count I on Defamation, however, it was applied to the wrong fact as to the starting date of the limitation period. On Counts II and III, the law of the District of Columbia should also have been considered and perhaps applied based upon Conflict of Law principles and applying the "most significant contact" and "situs

of the injury" rules. Yet, the application of Conflict of Law principles, as are frequently involved in multi-jurisdictional cases as this, cannot be done until the factual record is established through discovery which was denied here. The fact that Conflict of Law principles do come into play since the case involves a widely published and distributed book touching many jurisdictions, only underscores the need for basic discovery to have been afforded.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

Yes. The district court made a finding as to when the limitation period started to run solely on the basis of two affidavits from defendant employees. The affidavits were legally deficient to establish that fact. The court then applied the one-year period to this erroneous starting date, and also failed (indeed was unable without a record having been established) to consider what law was applicable to the other Counts. The harsh and inequitable action in terminating the case was premature at best and basic due process principles were violated in so abruptly clearing the docket.

5. What action do you want the Court to take in this case?

This Court should reverse the lower court's ruling on defendant's Motion, with the instruction that a reasonable amount of time be allowed for discovery to be conducted so that plaintiff's right of cross-examination can be exercised and the Rules of discovery applied to establish a proper factual basis prior to any ruling on a Statute of Limitations defense. The case record at the time of the Motion was insufficient as a matter of law to justify the granting of it given the burden of proof standards applicable to such a summary motion.

6. If you think the Court should hear oral argument in this case, why do you think so?

Yes. Plaintiff submits that the district court's action in so early terminating the case on an issue involving both questions of fact and law was clearly extreme and violates basic due process standards. There is no compelling reason why basic discovery should not have been allowed especially under the court's liberal rules in that area. A case should not be disposed of simply on affidavits, particularly where they are submitted by persons without personal knowledge of the ultimate fact questions that would determine the commencement of the limitation period in this case. The question of what law is to be applied in a multi-jurisdictional publication suit

as this also can not turn simply on affidavits, particularly where the affidavits on their face are of limited factual content, surrounded by carefully worded phrases, that do not reach the central factual question defendants themselves have raised. The district court's action constitutes reversible error and plaintiff feels this is clear from the record and informal briefs submitted. In the event that any question to the contrary does exist, the oral argument should be heard in this case.

/s/
Signature
NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE.

4CCA-23
Rev. 9/4/79

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL J. MORRISSEY,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 82-1213
	)	
WILLIAM MORROW & COMPANY, INC.	)	
	)	
and	)	
	)	
BANTAM BOOKS, INC.	)	
	)	
Appellees.	)	

APPELLANT'S SUPPORTING MEMORANDUM

This case was filed in the U.S. District Court for the Eastern District of Virginia on November 19, 1981. It names two book publishers as defendants, and concerns both the hardback and paperback versions of a book entitled Spooks, a publication widely advertised

and distributed throughout the United States. On January 6, 1982, and with only the Complaint and Answer having been filed in the case, defendants filed their Motion to Dismiss in which they, inter alia, argued that the action should be dismissed based upon a Statute of Limitation defense. The motion was heard by the court on February 12, 1982.

The court held that the multi-publication rule did apply and therefore the action of the hardback publisher, William Morrow & Company, was renewed for Statute of Limitation purposes with the subsequent publication of the book in paperback form by defendant Bantam Books, Inc. The court then held that where Virginia law is to be applied, a one-year Statute of Limitation period exists with respect to

defamation actions. Plaintiff does not dispute the fact of Virginia's one-year Statute of Limitation for defamation. However, in a multi-jurisdictional action as is frequently encountered in suits where publications are widely distributed and promoted, Conflicts of Law principles must be weighed in determining the applicable law to the various Counts in the Complaint, i.e., a determination of the "nexus" of the action.

In particular in this case, the laws of the District of Columbia should have been considered and they were not. Indeed, the establishment of a factual record is first necessary and in this case was never allowed by the court to reach the discovery phase. Plaintiff submits that it was error for the court

to dismiss all three Counts of the Complaint without giving due consideration to the laws of the District of Columbia as they might apply here to each of the Counts under the Conflict of Law rules. In brief, those rules require that in a multiple jurisdiction matter, the court, after discovery is conducted to ascertain the relevant facts, looks to the jurisdiction where the most significant contacts are and injury has occurred. It may then apply the law of that forum. The case should have been allowed to proceed so as to reach the point where that decision could have been made.

The District Court then applied the one-year Statute of Limitation to the two affidavits attached to the defendants' Motion. There was no other

factual record established in the case at this early stage. The first affidavit was of no consequence in the court's decision. It was submitted by one James D. Landis, an employee of defendant William Morrow & Company, and concerned when the hardcover version of the book was published. Since the court had correctly held that the multi-publication rule applied, the actions of William Morrow & Company were renewed through its subsequent agreement with the second defendant and paperback publisher, Bantam Books, Inc.

The second affidavit the court found dispositive of the factual question, and this was in error. An employee of Bantam Books, Inc., one Heather Grant Florence, stated that "...the book was generally available and

sold to the public in bookstores throughout the United States on or before November 20, 1979." This was measured against the December 1, 1980 date when the first case was filed.[1] The court ruled that the action had become time barred as of November 20, 1980 and granted the Motion to Dismiss on this Statute of Limitation grounds. The court's ruling was clearly incorrect.

That ambiguous time as to when a publication is "generally available" is

---

[1]The first case was filed on December 1, 1980 (C.A. No. 80-1165A). It was voluntarily dismissed, without prejudice, by a joint Stipulation signed by the parties. Pursuant to Virginia Code Section 8.01-229, the case was properly refiled within six months following the Stipulated Dismissal. Hence the reference date for purposes of the defendants' Statute of Limitations argument was December 1, 1980.

not the applicable legal standard as to when the limitation period begins to run. Other factual questions must be answered. For example, when was the last shipment made of the book from the publisher to the bookstores or distributors? Also, were any reprintings of the book made after the publication of its first edition? What were the dates of all shipments of the book after December 1, 1979 from the printer, and the number of copies of the publication made in each shipment? These and other relevant questions had been submitted informally by letter earlier to the defendants, and the defendants refused to answer them. Discovery should have been allowed in order to compel answers to these essential questions.

Under the standards of Rule 56, mere reference by an individual as to when the book was generally available to the public is not determinative for the commencement of a limitation period. The statement in the subject affidavit is merely conclusory language unsupported by a showing of personal knowledge of the affiant, or the existence of other facts that may affect the running of the limitation period. See, Benton-Volvo-Metariae, Inc. v. Volvo Southwest, Inc., 479 F.2d 135 (5th Cir. 1973). A record as to the basis or extent of the "personal knowledge" claimed by affiant must have been established and is lacking in this instance.

The single affidavit relied upon was silent on any later reprintings of

the book, and new editions, or any special orders. Added to this is the fact that the book itself carries the publication date of "December 1979". Therefore, a document referring only to when the book is "generally available", that is silent on other central facts, such as later reprintings, distributions, and/or sales, and does not contain the "personal knowledge" standards required under FRCP Rule 56(a), does not meet the legal requirement that there be no material questions of fact remaining. Where there is a question of fact as to the applicability of the defense based upon the affidavit submitted, the motion must be denied. 2A Moore's Federal Practice ¶12.10 at 23-16-17. Also, Henna v. United States Veterans Administration Hospital, 514 F.2d 1092 (3rd Cir. 1975).

A Statute of Limitation defense is only valid under a motion to dismiss under FRCP Rule 12(b) when the time alleged in the complaint clearly shows that the cause of action was not brought within the statutory period. Khuray v. Playboy Publications, Inc., 430 F.Supp. 1342 (S.D.N.Y. 1977); 2A Moore's Federal Practice, supra, ¶12.10 at 2314. That "clear showing" in no where present when the affidavit is reviewed as a whole in light of the points raised herein.

The court's ruling in the manner described based upon the application of Virginia's one-year Statute of Limitation rule to the "generally available" language in a single affidavit has precluded plaintiff from proceeding on any and all of the three Counts set forth in its Complaint. This

is the ruling that this Court is asked to reverse for the reasons set forth. The case should be remanded to the District Court with a reasonable time allowed for discovery as provided for in the Federal Rules so that a proper factual basis can be established. This would allow exercise of plaintiff's right to cross-examine the affiant on whose affidavit the court relied.

Plaintiff restates its additional claims for wrongful invasion of privacy under Virginia Code Section 8.01-53, and for a similar claim under laws of the District of Columbia with due consideration being given to the "situs" of causes of action to that jurisdiction. These are presented in detail in Plaintiff's Reply In Opposition To Defendants' Motion To Dismiss, a part of

the lower court case record. As stated previously, however, all causes of action in the case can only be properly considered after a factual record has been established through discovery. The court without good cause denied this fundamental right to plaintiff. This constituted reversible error. The court further granted defendants' Motion on the basis of an incomplete and deficient factual record, i.e., an affidavit. That was insufficient as a matter of law to meet the standards applicable to such summary motions. This was also reversible error.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Informal Brief and Supporting Memorandum was hand-delivered on the 15th day of July 1982, to Baker & Hostetlier, attorneys for defendants, attn: Douglas K. Spaulding, Esq., 818 Connecticut Avenue, N.W., Washington, D.C. 20006.

/s/

FOR THESE REASONS the judgment of the District Court should be reversed and the case remanded to that court for further proceedings in accordance with this Court's ruling.

Respectfully submitted,

/s/

Michael J. Morrissey
Plaintiff, pro se
6647 Midhill Place
Falls Church, Virginia 22043

July 14, 1982

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1213

Michael J. Morrissey,

Appellant,

versus

William Morrow & Co., Inc.,
Bantam Books,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon consideration of the informal briefs of the parties;

It appearing to the court that full briefing and oral argument would be of assistance in resolving the issues presented;

IT IS ORDERED pursuant to Local Rule 7(b) that the following formal briefing and oral argument schedule is established:

(1) appellant shall serve and file on or before August 10, 1983 twelve copies of his formal brief which shall comply with Rule 28 of the Federal Rules of Appellate Procedure, and six copies of his formal

appendix shall comply with Rule 30 of the Federal Rules of Appellate Procedure;

(2) appellees shall serve and file within 30 days of service of appellant's brief twelve copies of their formal consolidated brief which shall comply with Rule 28 of the Federal Rules of Appellate Procedure;

(3) appellant's reply brief, if any, shall be served and filed within 14 days of service of appellees' formal brief and shall

also comply with Rule 28 of the Federal Rules of Appellate Procedure;

(4) oral argument is tentatively scheduled for the November term of court.

Entered at the direction of Judge Murnaghan for a panel consisting of Judge Phillips, Judge Murnaghan and Judge Chapman.

For the Court

/s/
CLERK

FILED July 1, 1983
U.S. Court of Appeals
Fourth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1213

MICHAEL J. MORRISSEY,

Appellant,

v. APPENDIX E

WILLIAM MORROW AND COMPANY, INC., et al,

Appellees.

On Appeal from the
United States District Court
for the
Eastern District of Virginia

APPELLANT'S PETITION FOR REHEARING

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1213

MICHAEL J. MORRISSEY,

Appellant,

v.

WILLIAM MORROW AND COMPANY, INC., et al,

Appellees.

On Appeal from the
United States District Court
for the
Eastern District of Virginia

APPELLANT'S PETITION FOR REHEARING

Appellant files this Petition for Rehearing to the Court's Decision dated July 26, 1984 in the case. Through this Petition, the Court is asked to reconsider and grant rehearing on the Court's Decision which affirmed the Lower Court's dismissal of the action.

I. INTRODUCTION

This Petition addresses primarily two areas that the Court is asked to reconsider.

(1) The first concerns the Court's misstatement of the facts in certain critical areas of the case. Relying, in part, on those misstatements, the Decision then injects at various points attacks on the appellant personally based upon the Court's apparent disagreement with judgment decisions that were made regarding discovery in the case. It is submitted that in this respect the Decision goes beyond addressing and deciding the issues. It takes issue with appellant personally in areas that involved no more than judgment calls in procedural matters during early stages in the case prior to the Court's initiation of formal discovery. It is a terrible injustice for the Court to embark upon a personal attack on a party in a published decision as this where the fault

it finds lies solely in differing interpretations of the applicable Federal Rules, particularly those on discovery.

(2) The second area addressed in this Petition is the Court's affirmance of the action being dismissed based upon a statute of limitations defense filed as defendants' initial pleading in the case. This was done prior to the Court's establishment of any formal discovery period, as is normally set after the parties are at issue. The sole basis supporting defendants' early Motion to Dismiss was two cryptically worded affidavits which purported to establish the applicable one year limitation period as having run -- in one instance, only days prior to appellant's filing of its case. As discussed herein, appellant submits that this defense must be tested against the record established as of the time defendants chose to make that filing. The

record, as clearly expressed in the dissent opinion, does not contain the factual underpinnings to support the granting of the statute of limitations defense at this stage. Appellant's primary argument on this point was not a request for additional discovery time, but rather was that defendant's Motion was premature, and should not have been made until after discovery of the relevant facts which are uniquely in defendants' possession.

(3) Appellant also addresses briefly herein the single-publication rule, the injurious falsehood claim, and the choice of law questions presented which should also be remanded.

Accordingly, and for reasons as more fully discussed below, reconsideration is sought on these issues, and the case should be reversed and remanded for further action in accordance with the Court's Decision.

II. THE CORRECTION OF KEY FACTUAL MISSTATEMENTS REMOVES ANY NEED OR APPROPRIATENESS OF PERSONAL ATTACK ON A PARTY IN THE DECISION.

The Decision at pages 8-9 states:

> He (appellant) argues that during June 1981 he called the offices of one of the defendants to ask for certain information over the telephone. He claimed that he was surprised when defendants' employees did not furnish this information to him by telephone. It is inconceivable that any attorney, admitted to practice in the courts of Virginia and the District of Columbia, as well as the United States District Courts, would expect to obtain or use information from such a telephone conversation with an adversary. (parenthesis added).

The above statement, standing alone, does present a rather unusual manner of conducting discovery as provided for under the Federal Rules in normal trial circumstances. However, the facts are misstated. The telephone call was made in

January 1980, not June 1981. It was made directly to the publisher, before the suit was filed (J.A. 72). The purpose was to seek to obtain information concerning the book's publication date, and confirm the December 16, 1979 date of publication listed in the book itself. (Appellant's Brief at p. 3). That telephone inquiry was not for the purpose of discovery pursuant to any filed lawsuit at that time, but was made to obtain information concerning the date of publication which may have affected the time for filing the lawsuit. There was no claim of surprise by appellant when this matter of the January 1980 telephone call to the publisher was brought up at the hearing on defendants' motion (Transcript from February 12, 1982 hearing, J.A. 71-73). What did occur in June 1981 was that a list of questions on the statute of limitations issue was submitted to defendants in letter form by appellant's

counsel. The use of a letter in that instance, rather than the standard procedure of filing Interrogatories as provided for under the Federal Rules, was done based upon the limited time period that had been set for the purpose of completing all discovery relating to the Statute of Limitation defense. The time allowed under the Rules for the answering of Interrogatories would have exceeded the time deadline that counsel for both parties were to meet. (Appellant's Brief at p. 3).

Therefore, the statement above-quoted from the Decision unjustifiably creates an inaccurate impression that an attorney proceeded to conduct discovery for use in a case by telephone, which is certainly not what did in fact occur.

The dissent opinion provides a generally accurate and most thorough analysis of the issues in the case. It presents sound reasoning as to why the case

should be reversed and remanded as the dissent recommends. However, the opinion in four instances appears to go out of its way to inject personal attacks on the appellant.[1/] Remarks of this nature do not appear necessary to a finding on the issues themselves. A reading of these passages in this published decision might conjure up notions of contempt of court or willful failure to comply with a court directive. Of course, none of that is evenly remotely involved in this case. Rather, the dissent opinion's conclusory remarks in this regard, while not pointing to specific actions, are apparently based upon the discovery, and extent thereof,

1/ Decision at page 17, last sentence of first paragraph Decision at page 17, last sentence of second paragraph; footnote, line 4 at page 21; and Decision at page 39, second sentence of first full paragraph appearing on that page.

that appellant chose to conduct in the case. It is for this reason that special exception is taken in this Petition to the appropriateness of such remarks.

This case was not an action of appellant's own choosing. The matter arose with the defendants' publication and promotion of books on "the use of private detectives, investigators and secret agents -- both within and outside government." The sensationalistic nature of the publications in hardback and paperback was captured in the title, "Spooks: The Haunting of America -- The Private Use of Secret Agents ("Spooks")." (Defendants' Memorandum, J.A. 15). Appellant, upon learning of the publication after-the-fact and the improper use of appellant's name widely throughout the book (Complaint, J.A. 3-4), found it necessary to respond. Appellant's lawsuit filed against the defendants sought, inter alia, to prevent further publication and sales of

the book. (Complaint, J.A. 7). Thus, appellant found it necessary to react within a relatively short one year period (measured from the date of publication and not from the date one learns of the publication) to a situation brought about by the defendants. Appellant's actions after the filing of the Complaint were based upon his best judgment, taking into account the time and resources that were available when this matter was thrust upon him. The brief discussion which follows concerning significant decisions in the case, and to issues now before the Court, shows that use of phrases that appellant "represented himself poorly", gave an "inadequate performance" (both in Decision at p. 17), and had the Court "dealing with an inept performance" (Decision at p. 39), are not warranted.

The initial case against the publishers was filed on December 1, 1980. Defendants subsequently filed a Motion for

Summary Judgment on May 21, 1981 that was supplemented on May 28, 1981, in which a statute of limitations defense was raised. The defendants' Motion was heard on June 5, 1981, at which time it was recognized that discovery was necessary on the factual questions raised by the Motion. A short time was allowed for discovery on that limited issue, but the limited time period specified did not allow for even the submitting and answering of interrogatories under the time periods allowed under the Federal Rules of Civil procedure. The parties, therefore, sought to embark upon an abbreviated discovery, with the possibility of depositions being taken in New York City where the principals of the defendant companies were located. However, in considering the scheduling and other logistical matters in taking depositions and conducting other discovery under the deadline under which the parties were operating, a Stipulation of Dismissal was

signed by all parties and entered in the case on June 9, 1981. This represented a joint filing by the parties based upon judgment of counsel, including counsel representing appellant (plaintiff in that case), at the time. No party in these case has every raised a question concerning the appropriateness of that filing or appellant's right to refile its case after the dismissal of the initial action in June 1981. Therefore, the referenced criticism of appellant should not be founded on matters of case strategy made, and jointly reflected by the Stipulation executed and filed by all parties, in the initial case filed.

Between June 9, 1981 and November 19, 1981 when the present case was filed, there was no action pending and therefore it was impossible to conduct discovery. This point is necessary to be made in light of the Lower Court's erroneous impression at the hearing in February 1982 that the issue

had been pending since 1980 (see Transcript from that hearing, J.A. 74, lines 15-16), whereas in fact it had not. The issue has only first arose with the filing of defendant's Motion in late May 1981 which raised the statute of limitations defense. As has been described, an abbreviated discovery was initiated to comport with the time allotted, but the magnitude of the out-of-town discovery which was foreseen eventually led to the entry of a Stipulation of Dismissal.[2/]

The present case was then filed on November 19, 1981. After service on both defendants was made, the defendants informally solicited from plaintiff his agreement for extensions of time for defendants to file their

2/ This Court's Decision, at p. 8, which makes reference to additional time being allowed for discovery but "was not used by the plaintiff" is a misstatement of fact in light of the efforts that the parties were making during that time.

responsive pleading and plaintiff agreed not to oppose those requests which were granted by the Court. After those continuances at defendants' request, their Motion to Dismiss the Complaint was filed on January 6, 1982 in which they filed a Motion to Dismiss and incorporated by reference their same Memorandum of Points and Authorities that had been filed in the prior action. Although this Court's Decision (at p. 8) makes reference to the trial judge's statement that appellant could have filed interrogatories immediately upon commencement of the second action, and this Decision remarks that "But again, nothing was done by the plaintiff" (Decision at p. 8), it is highly questionable whether that is the appropriate way for anyone to proceed. It is unorthodox discovery to attach interrogatories with the filing of a complaint. That would, necessarily, require a plaintiff to assume an Answer or

other responsive pleading as yet unfiled by the defendant. As stated in appellant's Reply Brief, "Mr. Morrissey was not required, nor would it have been sound trial strategy, to try to forecast the substance of defendants' responsive pleading and file discovery to challenge some imaginery motion. The extensions of time that defendants sought in which to file their responsive pleading were further support for Mr. Morrissey's decision not to try to guess defendants' trial strategy." (Appellant's Reply Brief at 9-10). Thus the fact that a plaintiff could attach interrogatories to its complaint inasmuch as that is not prohibited under Fed. R. Civ. P. Rule 33, does not imply that it should. Certainly the better trial strategy would appear to be not to second guess what a defendant will file but rather wait until defendant has stated its position with the appropriate filing. The decision not to attach interrogatories in

this manner, even given plaintiff's knowledge of the position taken by defendants in the first case, surely does not give rise to an "inept performance" or similar characterization.

Defendants' Motion to Dismiss on the statute of limitations ground was heard February 12, 1982,[3/] Appellant's position as a matter of sound trial strategy was that defendants alone had chosen the point in time in which to seek to have the action dismissed on the basis of a statute of limitations defense. It was appellant's understanding, based upon the clear language of the Motion to Dismiss and its supporting Memorandum of Points and

3/ It is noted that a longer time period existed between the filing of the Complaint and the filing of defendants' responsive pleading (after two extensions of time), than occurred between the filing of defendants' responsive pleading and the hearing thereon (where it was granted and the case dismissed).

Authorities, that appellant was confronted with a Motion to Dismiss which would focus on the pleadings along. (See, J.A. 10, para. 1). This judgment could hardly be termed as "inadequate performance" for it was based upon what the defendants themselves had set forth in their pleading. Furthermore, appellant had practical considerations to weigh in connection with the timing and expense of discovery to be conducted in the case. It is customary for the trial court to enter a pre-trial order which establishes specific dates for the conduction of discovery, and sets forth discovery deadlines and cut-offs. No such customary pre-trial order was ever entered in this case. Another matter of judgment, therefore, was whether it was necessary or even practical to embark upon a two-stage discovery effort which could be repetitious in many respects, and would be a matter of significant financial consequence in all

respects. It was appellant's reasoned decision that defendants' Motion to Dismiss was at best premature. Its Motion should be tested against the record, then established; and that record was insufficient to conclude that there were no factual matters in dispute. Appellant furthermore was not required to conduct discovery, and believed that the correct procedure would be to point out the factual deficiencies to the Court at the hearing on defendants' Motion, and seek the usual entry by the Court of a period for discovery at which time information on the statute of limitations question (which is uniquely in defendants' possession), as well as other discovery in the case, could be conducted in normal fashion. This assessment of the situation, and decisions made accordingly with an awareness of the Federal Rules of Civil Procedure as they relate both to matters of discovery and to a Rule 12(b) motion to dismiss, may be met

with a conflicting opinion, and ruling, by the Trial Court; but that is not tantamount to creating impatience brought about by "a lawyer's inadequate performance". (Decision at p. 17). Indeed, given the resources and other practical considerations in any case, a decision might be made to limit discovery on some matters while pursuing it extensively, under other circumstances, on others. The timing of such discovery is based largely on filings made by the adversary. Decisions such as these are all matters merely of trial planning based upon the constraints that may or may not exist in any particular case. They do not equate to poor representation; perhaps more appropriately, they reflect the use of available resources to pursue one's claim to trial on the merits.,

In summary, certain portions of the Decision, as discussed, appear to unnecessarily divert from the central

issues to makes personal disparaging attacks on appellant which all relate to the discovery conducted, or not conducted, in the case. As discussed above, this in part is based upon a misstatement of underlying facts. The other references in the dissent opinion are more conclusory in nature. A review of the case history shows that the apparent basis for such statements rests in matters of judgment that were taken by appellant, as well as his counsel, in the brief period prior to the case being appealed. It is suggested that the matters taken exception to herein might be appropriate in situations involving contempt of court, failure to appear, or willful disregard of court directives. As stated initially, however, none of that is involved in this case. Rather, a review of the factual history of the case shows that the matters of concern to the Court are ones which involved judgmental decisions which were made with good basis and in good

faith concerning the extent and timing of discovery. The language of the Decision addressed herein would seem unduly harsh in light of that, and the Court is asked to give its reconsideration to these statements.

III. THE DISSENT OPINION SHOULD BE ADOPTED FOR IT PRESENTS SOUND REASONING AND A THOROUGH APPLICATION OF THE LAW TO THIS CASE.

Aside from the question of the adequacy of time for discovery, there are ample reasons based solely on the facts established in the record itself that warrant a reversal and remanding of the Lower Court's ruling. The crux of this centers upon the time at which appellant's causes of action against the defendants started to run. Under Virginia's one year statute (Va. Code Sec. 8.01-248, 1977 Repl. Vol.), the Complaint must have been filed within one year from the accrual of the cause of action. Courts differ as to the appropriate test for determining the actual

accrual of the cause of action in mass-media, multistate publication cases. See, Appellant's Reply Brief at p. 15. However, regardless of the test applied, the affidavit of Bantam Books, Inc. -- the sole evidence before the Court on the issue as to that defendant -- does not established a basis for dismissing the action. The affidavit was very carefully worded, using the ambiguous phrase "generally available". That phrase appears nowhere in any of the cases which set forth when a libel cause of action accruse. (Appellant's Reply Brief at p. 15). As pointed out in the dissent opinion (at pp. 18-19), an earlier affidavit containing the exact same language as one submitted on behalf of defendant William Morrow and Company remained unexecuted, with the second "generally available" affidavit being the one actually executed and relied upon. That document along is insufficient as a matter of law to find for defendant

Bantam Books, Inc., on its Motion. See Hartmann v. Time. Inc., 166 F.2d 127, 132, 135 (3d Cir. 1947).

As further pointed out in the dissent opinion, it is publication that generally commences accrual of an action for defamation and related torts. The Bantam Books affidavit does not establish any such publication which would start the running of the statute of limitations. It is fundamental that on a summary judgment motion where conflicting inferences may be drawn, the inference must be made against the party seeking summary judgment. United States v. Diebold, Inc., 369 U.S. 654 (1962).

With respect to the defendant William Morrow and Company, the record is similarly incomplete with respect to facts crucial to a determination of when the statute of limitations for the hardback version of the publication arose. The facts are silent with respect to the interrelationship

between each defendant. They are also silent regarding the number of books sold by William Morrow and Company, and the dates of those sales. No record has been established regarding any subsequent editions of the hardback publication, and a new edition would certainly have a bearing on an accrual of a cause of action against that publisher. Even the slightly different wording of the William Morrow affidavit is not sufficient to conclude that there are no material questions of fact which bear on this issue. Therefore, applying the standard that conflicting inferences are to be construed against the party seeking summary judgment, these outstanding fact questions should have been decided in appellant's favor and the case allowed to proceed. Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co., 381 F.2d 245, 249 (4th Cir. 1967). See also, Dissent Opinion at pp. 18-21.

The Lower Court adopted the November 20, 1979 date set forth in the Bantam Book affidavit as the date the action accrued for statute of limitations purposes. Yet the affidavit does not say the book was every communicated to third persons. It, therefore, does not meet the applicable test of the book being "available and communicated to the public" which is necessary to start the running of a statute of limitation. Moon v. CBS, Inc., Circuit Court of the City of Richmond, No. LD 1544 (June 29, 1980). (Dissent Opinion at p. 26).

In addition to questions remaining as to the applicable date to apply for the running of the statute of limitations, other significant questions remain about the application of the single publication rule. The Court applied a "first-publication rule" effective November 29, 1979, yet there is nothing in the record to show that the book was "communicated to the

public" by that date as is required in Moon v. CBS, Inc., supra, or under the standard of Hartmann v. Time, Inc., 166 F.2d 127, 132, 135 (3d Cir. 1947) where the standard applied was that accrual occurs in a large distribution situation, such as a book publication, when the book goes into circulation (is read by others). The communication inference might be drawn from the William Morrow and Company affidavit, but it cannot be drawn from the Bantam Book affidavit. Even where the inference is drawn, on a summary judgment motion that inference in favor of the defendant would be inappropriate. See also, Dissent Opinion at pp. 23-29 re discussion of single publication rule and reasoning for the remanding of this case on that basis.

A serious unresolved question also exists with respect to the published "official" issue date that appears in the book itself. The relationship of a printed publication date to the actual publication

of a book (as opposed to newspapers or magazines) requires some evidence of record regarding the trade practices of the publishing industry. See Appellant's Reply Brief at p. 16. The actual date of the book's publication would bear on the number of copies sold both prior, and subsequent, to the pivotal December 1st date established by the filing of the Complaint. This would, in turn, bear upon the single publication rule question which also now rests on insufficient facts. For summary judgment purposes, one cannot assume the extent of widespread circulation, or the number of books sold. Khaury v. Playboy Publications, Inc., 430 F. Supp. 1342, 1344, n. 1 (S.D.N.Y. 1977). Basically, a crucial fact on the hardback version that carries over to the paperback version is that it has not been established that widespread distribution of Spooks occurred prior to December 1, 1979. This factual void should rule out the dismissal of the case as to either defendant.

On review, the record is seen to be silent on a number of critical facts that are essential to rule onthe statute of limitations defense. The dissent opinion presents a most thorough and well-reasoned discussion on this point and discusses in further detail many of the cases presented by appellant on brief in support of why this case should be reversed and remanded. The dissent opinion offers not only should reasoning with respect to legal precedent, but also provides background insight as to the development of this area of tort law. It provides a solid basis for rejecting the statute of limitations defense at this early stage of the case. The dissent opinion should be adopted by the majority, and the case reversed and remanded for the reasons as set forth herein and in the dissenting opinion at pp. 17-33.

IV. APPELLANT'S INVASION OF PRIVACY COUNT SHOULD HAVE BEEN PERMITTED TO CONTINUE SO THAT RELEVANT FACTS COULD BE ESTABLISHED IN THE RECORD TO ASCERTAIN THE APPROPRIATENESS OF THE CLAIM.

Appellant briefly states that, for much the same reasons as discussed, supra, on the primary statute of limitations question, appellant's Invasion of Privacy count should have been allowed to continue at least through discovery so that it is not necessary to make assumptions regarding whether or not sufficient contacts with a neighboring jurisdiction may or may not exist.[4/]

4/ Certainly, there is no harm in permitting the opportunity for a factual basis to be established from which the question could be directly answered. As the case now stands on this claim, its rejection is based upon the claim that details of ties or contacts of appellant with the District of Columbia were not sufficiently alleged. A record should be permitted to be made as to the existence of such ties and contacts during the course of discovery in the case. Alternatively, Leave to Amend the Complaint would be proper.

V. APPELLANT'S CLAIM FOR INJURIOUS FALSEHOOD SHOULD NOT HAVE BEEN DISMISSED.

The question as to whether a viable tort exists in the Commonwealth of Virginia based upon a claim of injurious falsehood has apparently not come before the Court for a decision. However, it is a recognizable action at common law. Appellant believes that the reasoning set forth in the dissent opinion (at pp. 37-39) is sound on this point, and should be adopted by the majority.[5/]

5/ The fact that no previous decision under this tort claim has been decided should not bar it from being considered by the Court. This action should be allowed to continue with the other claims in proceeding through discovery so that a full record might be presented to the Court on which sound factual reasoning could be drawn to rule on this claim of first impression.

VI. CONCLUSION

FOR THESE REASONS, appellant prays that the Court's decision of July 26, 1984 be modified in terms of its personal remarks on appellant, in light of the fact that actions taken reflect more judgmental decisions rather than any willful or deliberate actions directed to the Court itself. Furthermore, appellant prays that the Dissenting Opinion be adopted in all respects.[6/] On all other issues and specifically with repect to the statute of limitations question, the Dissent Opinion should be adopted as the majority, and the case reversed and remanded to the Lower Court in accordance with the Court's Order.

Respectfully submitted,

MICHAEL J. MORRISSEY

By /s/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on August 16, 1984, a copy of the foregoing Appellant's Petition for Rehearing was mailed, United States postage prepaid, to Brian S. Harvey, Esq., Baker & Hostetler, 818 Connecticut Avenue, N.W. Washington, D.C. 20006, counsel for appellees.

/s/

6/ Exception is made for its invasion of privacy count discussion. That particular count should be allowed to proceed to determine the extent and sufficiency of appellant's contacts with other jurisdictions.